Labour Law and Social Insurance in the New Economy: A Debate on the Supiot Report

Edited by David Marsden and Hugh Stephenson

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Acknowledgements and Biographical Notes on the Speakers

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Peter Auer is Head of the Labour Market Policy Team, Employment Strategy Department, International Labour Office, Geneva. He previously worked on labour market issues while a Senior Research Fellow at the Wissenschaftszentrum, Berlin. His most recent book is 'Employment Revival in Europe: Labour Market Success in Austria, Denmark, Ireland and the Netherlands', (ILO, Geneva, 2000).

Dominique de Calan is Deputy Director-General of the French Engineering and Mining Employers' Union (Union des Industries Métallurgiques et Minières), President of the MEDEF's standing committee on higher education and research (French national employers' organisation), and Vice President of the National Union of Small and Medium Enterprises. Previously, he has been Director of Personnel and Board Member of the Compagnie Boussac-Saint-Frères, and Chargé de Mission at Usinor-Sacilor. He is also a member of the Regional Council of Britanny, and of the Municipal Council of Saint-Pol-de-Léon.

David Coats is Head of the Trades Union Congress' Economic and Social Affairs Department. He manages the TUC's work on economic and industrial policy, the welfare state and the development of partnership at work. Before his appointment as Head of Department, he led the TUC's Partnership Team and was also responsible for pay (including the National Minimum Wage), collective bargaining and human resource management issues. He represents the TUC on the Executive Committee of the Involvement and Participation Association, the Advisory Board of the Industrial Relations Research Unit at Warwick University, the Modernising Government Project Board, and the Partnership Fund Evaluation Panel. He is a Fellow of the Royal Society of Arts and a governor of a primary school near his home in Haringey, North London. From 1990-98 he was a councillor in the London Borough of Haringey.

Simon Deakin is a Reader in Economic Law at the University of Cambridge. Since 1994 he has directed an interdisciplinary research program on corporate governance and contracting at the ESRC Centre for Business Research, in Cambridge. A focus of his research is labour market regulation and its links to competitiveness. His books include Labour Law (with Gillian Morris), Enterprise and Community (ed. with Alan Hughes) and Contracts, Cooperation and Competition (ed. with Jonathan Michie).

Richard B. Freeman is Co-Director of the Centre for Economic Performance at the London School of Economics, where he is a Visiting Professor. He also holds the Ascherman Chair of Economics at Harvard University. He is currently serving as Faculty Co-Chair of the Harvard University Trade Union Program. Freeman is Program Director of the National Bureau of Economic research's Program in Labour Studies. He is a member of the American Academy of Arts and Sciences. He has served on five panels of the United States National Academy of Science: High Risk Youth, Post Secondary Education and Training in the Work Place, Employment and Technical Change, Demographic and Economic Impacts of Immigration, and National Needs for Biomedical and Behavioural Sciences.

Reiner Hoffmann has been the Director of the European Trade Union Institute (ETUI) in Brussels since 1994. His main research activities include Europeanisation of industrial relations; working time policies, and modernisation of trade unions. He has been editor of the quarterly *Transfer - European Review of Labour and Research* since 1995. He also edits – with the General Secretary of the ETUC, Emilio Gabaglio, - the European Trade Union Yearbook and has edited several books and published many articles. Hoffmann studied Economics at the University of Wuppertal in Germany. He started his professional activities as an Assistant to the Economic and Social Committee of the EC and worked as an economist at the University of Wuppertal. From 1983 he worked for the Hans-Böckler Foundation in Düsseldorf and was until September 1994 Head of the Research Promotion Department.

Renate Hornung-Draus has been Director of European and International Affairs at the Confederation of German Employers' Associations (BDA) since 1994 and Vice-President of the European Employers' Union (UNICE)'s Social Affairs Committee. She is also a member of the European Social Dialogue Committee, and Vice-President of the Employers' Group of the Economic and Social Committee of the European Communities. She studied Economics, Politics and Sociology at the Universities of Freiburg and Paris and is a member of the German Industrial Relations Association.

Jane Lewis is Barnett Professor of Social Policy at Oxford University. Before going to Oxford in 2000, she was in the Department of Social Policy and Social Administration at the LSE, a member of the Modern History Faculty at the University of Oxford, and Director of the Wellcome Unit for the History of Medicine; and Professor of Social Policy at the University of Nottingham. Her research interests are focused mainly on gender and social policy, family policy, the voluntary sector, community care and health policy, and the history of social policy. During the past decade her research has concentrated on lone mother families in the UK and other countries; a study of the implementation of the community care policy in the UK; the "gendering of welfare regimes"; the nature of the voluntary/statutory partnership in the UK over time; and, most recently, individualism and commitment in marriage and cohabitation and the implications for family law. She is the author and editor of seventeen books and numerous scholarly articles.

David Marsden is Professor of Industrial Relations at the London School of Economics and a member of the Centre for Economic Performance, LSE. His current research in the CEP comprises a study of performance management and performance pay in the public services and its effects on motivation and performance, and an

international study of pay inequalities and economic performance in Europe, Japan and the United States. He is also extending the ideas of his recent book 'A Theory of Employment Systems: Micro-Foundations of Societal Diversity, (OUP, 1999). Professor Marsden organized the conference with the help of a grant from the European Commission.

Pamela Meadows is a Visiting Fellow at the National Institute of Economic and Social Research in London, and has recently completed a visiting professorship at the Arbetslivsinstitutet (National Institute for Working Life) in Stockholm. She is also adviser to the Joseph Rowntree Foundation on its research program on Work and Opportunity. She edited the 1996 book which launched the program, Work Out -or Work In? Contributions to the Debate on the Future of Work. Previously she was Director of the Policy Studies Institute and before that Chief Economist at the UK Department of Employment. She was a member of the European Commission's Group of Experts on the Future of Work and Labour Market Regulation in Europe, which produced the Supiot Report.

Hedva Sarfati is a political scientist and an analyst of comparative employment, social protection and labour relations policies and practice. She is currently directing an international research project on the interactions between labour market shifts and social protection reforms (ISSA/LMSP) for the International Social Security Association (ISSA). During her career at the International Labour Office (ILO), she was Director, Industrial Relations and Labour Administration Department and, before that, Chief of the Salaried Employees and Professional Workers Branch (employment conditions and industrial relations in public administration, health, education, public utilities, post and telecommunications, financial services, retailing, the media and performing arts). She has been Chief Editor of the quarterly *Social and Labour Bulletin*, and is currently a member of the Editorial Board of the journal *Industrial Relations*.

Alain Supiot received his State Doctorate in Law in 1979 (Bordeaux) and became Professor of Law in 1980, first at the University of Poitiers and then at the University of Nantes. At the University of Nantes, he founded the Maison des Sciences de l'Homme *Ange Guépin*, which promotes a multidisciplinary approach to analysis of the changing nature of social cohesion. His career has included many periods of research abroad (including at the Institute of Industrial Relations, Berkeley in 1981; the European University Institute, Florence in 1989/90; and the Wissenschaftskolleg (Institute of Advanced Studies) Berlin in 1997/98). He has been a regular contributor to the French law journal *Droit Social*, and is member of the scientific advisory committee of the *International Labour Review* (ILO, Geneva). He has also written many books on labour and social security law (including Critique du Droit du Travail, 1994, and the collective work Le Travail en perspectives, 1998). Under the title of Au delà de l'emploi, Flammarion published the findings of the interdisciplinary study group Supiot chaired on "The Transformation of Work and the Future of Labour Law in Europe" undertaken for the European Commission, now published in an English edition by Oxford University Press. He is a member of the Scientific Council of the French National Council for Scientific Research (CNRS), and chair of the National Council for the Development of the Human and Social Sciences. His current research analyses the legal foundations of social cohesion and its transformation.

Introduction

Can the Right Employment Institutions Create Jobs?

David Marsden

Posing the right questions

For much of the 1980s and 1990s, the dominant view of labour market reform was that there should be fewer labour laws and fewer issues covered by collective bargaining. These were necessary to protect workers, but such protection, it was argued, was bought at a high price. Protecting those in employment only made things worse for the unemployed. This view rested on a very partial understanding of the way institutions underpin the operation of labour markets. After a decade and a half of labour market "deregulation" in several countries, OECD experts concluded that the aggregate evidence as to whether employment protection actually caused firms to hire fewer workers was unclear (OECD 1999). Does that mean that labour market reforms have little to contribute to boosting employment? Not if we heed the many individual employers and their associations, who still maintain that such measures do discourage them, or their members, from hiring new workers.

When faced with conflicting answers from the evidence to such important questions, are we asking the right questions? The European Commission invited a group of lawyers and economists, chaired by Alain Supiot, to look at the reform of labour law. Their reflections gave rise to the "Supiot Report", which is the subject of the debate in this Discussion Paper. This summer sees its English publication by Oxford University Press. The group decided it was time to look at the fundamental rules and institutions underpinning employment in our societies. Rather than looking at individual employment protection measures it stood back and looked at the nature of the employment relationship itself and how it is built into the system of social protection and risk sharing.

By doing this, Supiot and his colleagues have delivered one of the most original contributions to thinking on the reform of the employment relationship and employment law. They recognise the pressures on firms for greater flexibility to enable them to respond to

technical change and greater international competition. They also recognise changes in households and a continuing but evolving need for worker protection. The solutions they sketch out try to reconcile these by creating new institutional frameworks for employment that are compatible with more fluid employment relationships and shorter duration jobs.

To achieve this, one has to think about labour institutions as providing a contractual framework to enable workers and firms to cooperate to share the risks involved in a manner both parties find equitable. The invention of the limited liability company created a framework that enabled people to pool financial resources to support an economic venture. In a similar fashion, the invention of the employment relationship has enabled firms and workers to develop stable and flexible working relationships, despite their divergent interests and despite the often limited degree of trust between them. In both cases, the basic rules of the relationship have to constrain the parties so that for each one the actions of the other are predictable. Such predictability then becomes the basis for fruitful cooperation. In a word, the institutions constrain in order to enable. Both the limited liability company and the employment relationship have provided platforms for a huge economic expansion that followed their establishment. In both cases, their emergence was preceded by a lot of institutional experimentation, and neither are fixed in their current form for all time. In the case of employment, the question that Supiot and his colleagues asked was whether the fundamental design of the employment relationship had reached its limits, given the economic and social changes of recent decades, and whether and how it could be adapted so as to facilitate the new forms of economic activity with which many firms are experimenting.

Two decades during which "free markets" have been contrasted with "institutional rigidities" have obscured the benefits brought by the employment relationship to both firms and workers. It enables firms to hire workers on the basis of only very general indication as to the nature of their work. It is open-ended not just in its duration, but also in the types of work tasks to be assigned. It also enables workers to invest in firm-specific skills, and firms to develop key organisational capabilities. Because of its superiority over the forms of labour sub-contracting that had dominated in today's major industrial countries up to the late nineteenth century, it gradually came to displace them. Thus, an appropriate institutional innovation can create scope for a tremendous surge in economic activity by facilitating new patterns of organisation.

Such an open-ended contract between self-interested economic agents, in which job descriptions are vague and often far-removed from the tasks actually done, is not naturally stable and is prone to opportunism by both parties. Over the years, however, a number of

customary employment rules and a system of employment law have developed, which help contain such tendencies. Thus firms gain the flexibility of an open-ended contract and workers gain sufficient protection for it to be an attractive way of doing business with their employers.

The Supiot report makes three fundamental observations:

- the employment relationship in its existing form has reached its limits as many firms need more flexible relationships with their employees than it can currently provide;
- tinkering at the edges with special types of employment contract for different categories of workers has diluted protection without increasing new jobs; and
- reform of the employment relationship poses severe problems for labour law, collective bargaining and social insurance, because they have all based themselves on the standard employment relationship.

If we follow the analysis of the Supiot report, which brings together much current research, a new model of the enterprise is struggling to take form as firms find they have to respond to swiftly changing markets by continually restructuring. "Rationalisation" and "restructuring" are no longer features of periodic crises, but something firms do permanently. They may still need a "core" workforce, but the signs are that it is being restricted to a shrinking percentage of workers. In this, firms face a dilemma: if jobs become unstable for too many employees, then the established ways of regulating the employment relationship break down and workers are likely to demand more explicit, and hence less flexible, employment contracts. This issue is currently being debated in the US, where there have been two recent books entitled "'Broken Ladders"' (Osterman, ed., 1996), and 'The Boundaryless Firm" (Arthur and Rousseau, 1996) both of which deal with changing organisational patterns of firms and their implications for workers' careers and the traditional motivation levers of "commitment". Similar concerns are surfacing in Japan and Korea as financial reforms force changes in long-established employment practices. Many writers, such as Osterman, see an inevitable trade-off between internal and external flexibility, but it is only so if we assume the structure of the employment relationship remains unchanged, which brings us back to the radical nature of the Supiot report.

How can the employment relationship be reformed so as to accommodate new and more flexible organisation patterns of firms, and worker "careers" that span several firms? It

is clear that traditional concepts of "self-employment" are not adequate to this kind of need, so they do not offer a viable alternative to employment, hence the absence of any clear international trend for it either to grow or contract (OECD Employment Outlook 1997).

The link with employment levels and job creation comes about because firms need greater flexibility. Just as the rise of the open-ended employment relationship enabled new patterns of cooperation to develop - new contractual forms, more adapted to the flexible organisation structures firms are seeking, can facilitate a new expansion of economic activity. Like the "standard" employment relationship, they need to balance the flexibility needed by firms and the protections needed by workers.

There is however a puzzle in the evidence. Firms are actively seeking more flexible organisational structures, for example based on networked activities, organisation around projects and joint ventures, all of which require highly adaptable staffing arrangements. Yet, the aggregate evidence on employment forms demonstrates the remarkable resilience of the open-ended, long-duration, employment relationship, with alternative "non-standard" forms generally making only small inroads. Although there have been dramatic moves in some countries, there has been no common international trend across the industrialised world.

One possibility is that firms are discovering new sources of flexibility within the open-ended employment relationship. The other is that the alternatives are not sufficiently attractive to both firms *and* workers for there to be a high rate of voluntary take-up. The evidence referred to by the Supiot report is quite clear on this. Various kinds of employment protections and social insurance are built on the presumption of the "standard" employment relationship, so that most employees have little to gain and will resist alternative employment forms if they have the choice. If employers want to hire people into more risky alternative types of contract, they will have to pay a premium. Thus firms are frustrated in their search for more flexible models by the lack of an appropriate institutional framework for hiring labour services.

The now standard employment relationship emerged over a long period as a result of largely decentralised experimentation with periodic boosts from major institutional reforms. Likewise, new forms in between employment and self-employment probably will not arise from *a priori* reflection, but from social experimentation. The Supiot report gives some suggestions of such newly emerging employment forms, notably, the "activity contract", which broadens the range of activities bearing employment rights, and "para-subordination", a framework for successive and sometimes simultaneous work for several employers. But there are other examples. The US offers two very interesting cases of "project-based"

employment organisation: in Silicon Valley and in Hollywood. In the first case, a variety of social networks based on an "occupational community" appear to underpin collaboration around projects (Tolbert, 1996); and, in the second, the union gives a structure to the screen actors' labour market not dissimilar to that provided by craft labour markets in 19th century Europe (Paul and Kleingartner, 1994). It is worth remembering that, in the heyday of British shipbuilding, work was organised on a project basis, around each individual ship, and that craft labour markets provided a framework for skill formation and regulating employment relations. Indeed, the areas of work in which self-employment has most prospered in recent years have been where there are recognised craft and professional qualifications.

None of these examples is a panacea on its own, but together they offer a "bio-diversity" with the aid of which one can explore different ways of solving the problem of giving employers the flexibility and workers the security they need.

Organisation of the debates

The Supiot report considers two key aspects of the employment relationship: adapting employment rules to new concepts of the firm and the job; and adapting social insurance to new concepts of economic organisation and employment. As several speakers here argue, the two have gone together. The "Fordist" pattern of employment provided the dominant assumption for analysing the economic risks facing workers and, hence, was the conceptual foundation on which post-war risk sharing institutions and social insurance, have been built in many countries. The eligibility rules for social insurance have themselves helped shape the definition of key concepts, such as employment and self-employment. The debate falls, therefore, quite naturally into two parts: the first on employment law, introduced by Alain Supiot and Richard Freeman, and the second on social insurance, introduced by Jane Lewis and Simon Deakin.

Employment reform is a practical issue. We, therefore, asked a number of leading practitioners from the social partners and other experts to comment on the four contributions. Thus, Dominique Calan, from the French employers, Reiner Hoffmann from the European Trade Union Institute, and Pamela Meadows, a member of the Supiot team, comment on Supiot and Freeman. In similar fashion, Renate Hornung-Draus, from the German employers and the European employers' organisation, UNICE, David Coats from the British Trades Union Congress, and Hedva Sarfati, from the International Social Security Association, comment on Lewis and Deakin. The debates close with a final exchange between Alain

Supiot and Renate Hornung-Draus on the nature of the European social dialogue, one of the key channels through which the reforms might be introduced.

All the participants speak in a personal capacity and their views do not necessarily represent those of the organisations to which they belong.

Outline of the debates

Introducing the debate, Alain Supiot reminds us that the familiar distinctions of employment law are of quite recent origin and are the result of lawyers' efforts to develop a consistent system of rules to enable firms and workers to come together in productive ventures. Law operates by creating distinctions, such as between "people" and "things". These are fictions when applied to the real world, but they are necessary if we are to make certain transactions subject to legal rules. Thus, at the start of the industrial revolution, the law treated labour as if it were a commodity. Employment law gradually came to recognise the worker as a person who has a life beyond the immediate transaction and to incorporate personal rights into the relationship. The modern view of labour law allows the labour market to function, but does so at the cost of ignoring unpaid work and of pushing many new forms of contingent work into a twilight zone. This is the key limitation of the current "fiction": firms want to expand flexible employment relationships; and service employment growth depends on increasing numbers of women workers, for whom the transitions between paid and unpaid work are crucial. The full-time "male breadwinner" is less and less the "representative worker" to be protected.

The fundamental redesign of employment that Supiot and his colleagues propose includes the idea that we should establish the equivalent of citizenship rights (what the French call a person's *état civil*) into the arena of work. Just as someone has a "civil status", so they should have an "occupational status" that establishes a citizen's right of access to markets and trading activity. This status should extend beyond current market activity to embrace the transition between different kinds of activity, market and non-market work, rights to training and re-training, and so on. It would be backed up by a system of social "special drawing rights", so that people retain a right to income and other advantages when engaged in socially recognised non-market activities. By making workers' employment rights less dependent upon their current jobs, such changes would spread the risks of short-term and uncertain employment more widely, making them more acceptable to workers and so encourage the development of activities that require them.

Richard Freeman looks at current developments from the point of view of the United States. Then far from being too radical, the Supiot report appears rather cautious. As in Europe, the "manual male manufacturing" model has been displaced by a new "diverse digital tertiary" society, which has caused immense changes in the ways people work and has contributed to a growing "feminisation" of the workforce. So far, he confirms Supiot's diagnosis. In contrast, the US seems further advanced in blurring the distinction between recipients of labour and capital incomes. US workers are less financially dependent on their current wage as more receive income from capital. Around a quarter now receive profit sharing and stock option plans of one form or another, around a half have private pensions and around a third of equity on the US stock market is owned by pension funds. This changes the balance of risk between firms and workers and raises new areas for employee representation. Changes in company organisation raise important issues as to who is real employer, especially when subcontractors work on the main employer's premises. Who owns the job and what is working time? As firms put more stress on output than on the hours put in, who owns the idea one gets while "thinking in the shower"? Finally, social drawing rights seem to be consistent with other developments, such as loans and vouchers in education. However, achieving a political consensus on who is to pay is similar to the intergenerational problem of pension reform.

The first of the discussants, Dominique Calan, from the French employers, argues that employers and unions in France have been working hard to devise new contractual forms to deal with the problems raised by Alain Supiot and Richard Freeman. However, the State has been very slow to approve such agreements. The employment relationship's indefinite duration posed special problems for both sides because when the employer lays someone off there is often an implied fault. The person was not a good worker. Small firms operating in local communities can find this especially difficult and be discouraged from hiring. The French metal industry employers and unions have been working on new kinds of employment contracts which allow a break under pre-defined circumstances. Workers can be hired for the duration of a project, or in connection with a series of major orders. The point is that the break should be transparent and according to conditions agreed in advance, not subject to favouritism. In France, too, the social partners have reached agreements on how to cover those working on the customer's premises, the problem raised by Richard Freeman, but the State took 18 months to approve it. Reflecting on the shift to payment for results, he argues that this is what customers pay for, and to reward workers on any other criterion is to deny the real creativity present in all forms of work, not just that of intellectuals! Finally, he warns

that lifelong learning has to be paid for by workers and not by employers. Otherwise, it will inevitably go to the most productive and so be socially divisive.

From the European trade unions, Reiner Hoffmann stresses that the European unions have reacted positively to the international pressures on employers and that the real employment problems lie in low productivity service sectors. There the unions have urged a reduction in non-wage costs. The unions have also shown a willingness to adjust general agreements to the conditions in individual firms, particularly those in financial distress. The big problem has been how to regulate the growing area of precarious employment, how to ensure that increases are voluntary and in workers' interests. The Netherlands offers a good example of what can be done: there the expansion of part-time work was regulated by collective agreement. The dependent self-employed pose similar problems. To represent workers in the new economy, unions need to develop more decentralised structures, so they can be active in shaping and moderating flexibility procedures at company level.

Pamela Meadows, who was a member of the Supiot team, also underlines the importance of employment changes, both among employees and the self-employed. The traditional distinction is less and less relevant. Higher levels of education also mean that traditional management structures are inappropriate: employees often know more than their boss. Employers have become less willing to share life-cycle risks with their employees, something which affects older managers whose jobs have become less secure. She questions how far one can extend legal protection in these areas, because if there are willing buyers and sellers it is hard to prevent them getting together. Finally, if we look at the employment relationship and its predecessors, we see that the distribution of risk has been a long-standing feature. Annual contracts between master and servant smoothed out seasonal fluctuations in demand, for example. The "male breadwinner model" of employment was a recent form, but it protected men at the expense of women. The real challenge is now to devise new legal forms that distribute risks fairly between the parties and enables them to be effectively managed.

Turning to social insurance, Jane Lewis takes up the second major theme of the conference. The re-thinking of social insurance started before the current debate on employment reform, and has a wider remit. Post-war welfare states were built on the twin assumptions of full-time male employment and stable families – the male breadwinner model. This has been undermined by demographic and family changes as much as by economic change. In contrast to employment law, there has been a lot of change in welfare provision, and market principles have been introduced in a number of countries. The goals of

welfare policies have also shifted, for example, in France using family allowances to combat poverty, in the Netherlands to boost job creation and labour market reform, and in Britain to boost education and health provision alongside accepting a low wage flexible labour market.

The scale of family changes however means that these developments are not radical enough. The decline of the male breadwinner model has not yet led to full development of an 'adult earner' model in most countries. More commonly, it has led to the 'one and a half breadwinner' model with the predictable gender divide. To make the full transition, further moves towards self-provisioning are required. To do this, we need to compensate and share more equally the unpaid care work in our societies. We have also to promote the transitions between different types of paid and unpaid work during a person's lifetime. And finally, we need "in work" benefits to enable those who enter low paid flexible jobs to leave them. Like Richard Freeman, however, she expresses concern that the likely cost of achieving anything effective in this area will be high.

Simon Deakin offers a lawyer's view of the problems. The employment relationship in its current form is a recent creation, shaped by developing social protection and of social insurance systems. This is particularly the case for the distinction between employment and self-employment. Up to the 1870s, in Britain, the key distinctions were between middle-class employees, workmen or servants, and independent contractors. The purpose of these distinctions was to determine which kinds of workers were subject to the criminal sanctions of the master-servant relationship. After then and until 1945, such distinctions played an important part in social insurance because the early national insurance system did not cover higher paid middle-class employees, who it was felt could look after themselves. It did not cover casual employment, because that would have been too costly. Thus the modern distinctions are the fruit of these two processes of enforcement and risk sharing. But, even now, the picture is shifting with the growth of dependent self-employment, where numbers have grown because of the tax advantages of self-employment. If the Inland Revenue has managed to solve the problems of taxing this group of people, then we should not despair of developing effective employment rights for them. Some ingenuity is required.

Indeed, tax has undermined the principle of social insurance in Britain. Since the early 1980s, successive governments have used the revenues from national insurance contributions to subsidise cuts in income tax and the link between contributions and benefits has been broken, the latter now being mostly means-tested. The scale of this deception by governments leaves Simon Deakin pessimistic about our ability to solve the collective action

problems required for Supiot's reforms and to achieve the kind of adult worker model proposed by Jane Lewis.

Introducing the first comment, David Coats of the TUC observes that the most remarkable feature of employment in Britain has been the persistence of the traditional employment relationship. He disputes that it is under such pressure that we have to rethink the whole social security system. For British unions, the problem is rather one of how to adapt the existing system so that the employment relationship should remain the prime anchor. Much can be achieved, for example, by lowering of contribution thresholds for the low paid and certain other categories of workers. The great flexibility of common law in Britain may explain why the problems posed by Alain Supiot are less salient than under legal systems based on Roman law principles. Nevertheless, common law has not been particularly successful in handling the growth of dependent self-employment. Sometimes workers in this relationship are treated as if they were employees, as under minimum wage law, sometimes they are not. The big problem of the UK labour market in recent years has been the inflexibility of working time, with a polarisation between those on very long hours, and those on short hours, often in part-time jobs. Long hours are a barrier to lifelong learning and the flexibility that may provide.

Renate Hornung-Draus, of the German employers and UNICE, takes up the points raised by David Coates. Yes, we should retain elements of the current system, but small changes will not be enough. We need to advance on several fronts. One tension between social insurance and employment is that, in many countries, the former is funded by employer contributions. In addition, this tax base has been eroded by exempting special categories of employees. Both employment and social insurance need to adapt to a more diverse labour force with more independent breadwinners and more complex family structures. To tackle the problems of less secure employment, we have to break the link between social security and the employment relationship, although the financing of social drawing rights will not be easily solved. Many social insurance problems of less stable jobs will have to be solved by shifting contributions from employers to general taxation. Increased parental is a benefit to society, and there is no reason why the cost should fall on individual employers. However, electoral considerations to keep taxes low generate pressures for lower benefits and greater individual provision. In doing so, they will blur the division between capital and labour incomes as has occurred in the US. The Danish solution appears to avoid too great individualisation of risk while also providing very flexible labour markets.

Hedva Sarfati, drawing on her work at the ISSA, argues that one of the biggest problems of social insurance reform is the conflict of interest between insiders and outsiders. The lack of a proper political debate in many countries has made such problems worse. Debate educates people, making them more aware of the wider issues, and forces those promoting change to communicate their objectives in public. Often this is not done, which makes the inter-generational transfers much harder to manage. Such debate will be important for the implementation of the kind of proposals that Supiot and his colleagues are proposing. One needs social dialogue, so the weakness of unions in parts of the service economy is worrying. We need also to consider the balance between collective bargaining and legal implementation. She concludes by challenging European legislators and social partners to define the objectives of social insurance reform: better pensions or greater aggregate savings; better returns on public and private pensions; what protections should be made against mismanagement or underachievement of pension funds; and should unions share the management of pension funds?

The debate concludes with an exchange between Alain Supiot and Renate Hornung-Draus over the processes for implementing employment reforms. For Alain Supiot, the increasing role given to social dialogue in framing European employment rules is something new and distinct from collective bargaining as we have known it in the post-war years. Parliaments have created special jurisdictions for rule making by private bodies. This is reminiscent of practices of autonomous self-regulation by the medieval corporations. Renate Hornung-Draus contests the analogy. The special jurisdiction of social dialogue is rather similar to the practice in Germany whereby the state does not interfere in the freedom of the social partners to agree terms and conditions of employment. However, the legislator defines the scope of such regulation. At the European level, the social partners do not make law, but rather propose new rules which are then submitted to the various European political bodies, the Parliament, the Council of Ministers and the Commission.

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Chapter 1. Employment and its Legal Context

Chair - Renate Hornung-Draus

I should like to welcome you to this conference, which forms part of this year's annual conference of the Society for the Advancement of Socio-Economics. Our theme today is the transformation of work and the future of the employment relationship. Can the right labour institutions help create jobs? The basis of our debate is the Supiot Report. So I should like to say a couple of words to set this report into the context of our discussion.

The starting point for the Supiot Report is the diagnosis that all EU member countries are experiencing a mismatch between the existing regulatory frameworks for employment relations and social institutions and the requirements of the new economy. This has produced new and very diverse patterns of work organisation and employment relations. This situation has already led to considerable reform and changes at national level in the different EU countries. We all know about the Dutch model, the Danish reform of labour market policy, or the German reform of collective bargaining. For that matter, many other countries have launched quite substantial reforms, but economic integration and the single market also raises these problems at the European level. For this reason, in 1997 the European Commission set up an interdisciplinary group of experts - labour lawyers, industrial relations specialists, sociologists - to study the situation. They were not just to make an academic study, but were invited in addition to point out ways in which this mismatch between the regulatory framework and the economic and social realities could be addressed, without at the same time losing the European tradition of solidaristic and democratic societies.

The general rapporteur of this group of high-level experts has been Alain Supiot. As a result, its conclusions, which were presented to the European Commission in June 1998, have become known to as the Supiot Report.

To American friends participating in this conference, I would say that I see a certain parallel between the issues studied in the Supiot Report and those studied by the Dunlop Commission some seven or eight years ago in the United States. Richard Freeman will remember that we followed this American debate with great interest in Europe. On a personal note, I sincerely hope that the Supiot Report will not suffer the same fate as the Dunlop Report, which seems to have disappeared without trace.

For the Supiot Report, there are some good signs on the horizon. The EU Commission seems determined to give it a concrete follow-up. Last week the European Commission launched the first consultation with the social partners about a document entitled "The Modernisation of Employment Relations". This document proposes European-level instruments to modernise employment relations, to review existing EU labour law, to tackle the issues raised by tele-working and by economically dependent workers, who are not employees in the legal sense of the word. That is a first concrete follow-up. Another, of course, is this conference at the LSE.

Alain Supiot himself will present the report for which he was the general rapporteur and Richard Freeman, the eminent American economist, will respond. Richard Freeman knows about European economics and socio-economic models, but at the same time he has the refreshing viewpoint of an outsider, an American, and we are looking forward to his comments on the Supiot Report.

Alain Supiot

Out of respect for the English language, I will speak in French. I think you will prefer it!

First, I should like to thank you for giving me the opportunity of presenting, discussing and inviting comments on the report. Despite its title, it is the result of teamwork. (It is typical of this age that collaborative works tend to be attributed to one person alone.) Pamela Meadows, who is here today and who has done so much to get the report published by Oxford University Press, has been particularly involved in the work.

Since we are in the London School of Economics, I shall begin with a brief consideration of the relationship between law and economics. Our group decided to abandon the standard view that the law has to adjust (or be adjusted) to economic reality. Such thinking is implicit in today's question: "Can the law create jobs?" In our view the law should not be regarded as a set of tools, nor legal concepts as containers on a building site that can be used for whatever purpose is considered necessary.

In reality, economic and legal thinking are based on common distinctions. If we are thinking about markets, we immediately assume the existence of "things" on the one hand and "people" on the other; and that people want to trade things with each other. At this point we realise that economic thinking has inherited the old distinctions made by Roman law and the

Justinian Code between things and people. These are not eternal distinctions. They have a precise historical basis. I would say that their drawbacks are becoming ever clearer with problems such as those we are having with the patenting of the human genome.

However, without any doubt the area of labour law is the most important in revealing the drawbacks of juxtaposing people with things in this way. The question we have to ask is where work fits into this distinction between people and things. From the historical perspective, this poses a structural problem for western thinking. It is not a new problem. There will always be two views as to what constitutes work. It can be viewed as a relationship between two people ("master and servant" as English so elegantly puts it) where, because labour is provided by a person, he or she will have to work for another person and this constitutes a personal relationship. Alternatively, work can be seen as being something with an economic value, something that can be traded. In this case, work is a contract and not a personal relationship.

The Industrial Revolution introduced the concept of work as a contract and, initially, the liberal view was that work was just another commodity. This did not last long, however, because it is unrealistic to treat work as if it were a thing. It may be a necessary fiction if you are trying to create a market, but this does not change the fact that it is a fiction. In the end it had to be admitted that work is done by people - and this creates a major structural problem. As soon as you start to think of the labour relationship in terms of a contract, you have the structural problem of how to combine the limited duration of the contracted exchange with the longer working life of the man or woman involved. This was the problem facing the *ancien régime*, as in the 19th century, and it is the same problem facing us today. The answer provided by what Germans or we in France call the "social state" (*i.e.* modern forms of labour law) was to ensure that contracts grant status. In other words, any labour contract will give rise to a number of personal rights that will allow the person to survive in the long term. Thus employment contracts give you professional status. A number of rights are attached to these contracts. These are called "social rights" and concern both social security and the employer.

As a result, under all European labour law, status is built into the labour contract. What differs is the way in which it is built in. British collective bargaining (and the incorporation of collective bargaining agreements into individual contracts) is different from the French system where, for example, all contracts are subject to *ordre publique* (mandatory public policy). But the outcome is always the same, with status being built into all contracts. Economically speaking, this has led to a trade off between two values: the worker has given up his freedom and become subordinate. He has dispossessed himself in exchange for

security. This is "employment". I won't go into the etymological studies of this concept of employment that have crossed and re-crossed the Channel/*la Manche* many times. Essentially, however, employment means the trade-off between dependence and security.

This modern view of labour law allows the labour market to function, but it does have a side effect. It excludes from the market some activities that constitute work. I will mention just one of many: unpaid domestic work, which is actually the most important form of work so far as human survival is concerned. Let us imagine, as we often do in France, that tomorrow there is going to be a general strike. The economy grinds to a halt for three weeks. But life continues. If parents stopped feeding their young children tomorrow, life would not continue. What I mean is that the market relies on the non-market. The relationship between these two areas varies greatly from country to country. If we take the organisation of the labour market in Japan, it is obvious that it is particularly reliant on women. Since economic thinking is based on legal categorisations, we have become used to thinking of people who work, but are not paid, as being outside the labour market. This is one of the problems facing us today.

What, then, has led us to question such assumptions today? I will here touch on just two of the factors involved. First, under an institutional concept of work, employment is defined by comparison with four other types of work: unpaid work (which I have just mentioned), training, access to knowledge and all knowledge work. On my way here, I asked a colleague if the people sitting on the ground eating sandwiches were students. No, she said, they were workers. Clearly, deep-rooted within our subconscious is the belief that students are not workers. Study is not work. That is the second distinction. The third distinction, which is more or less strong depending on which European country you are looking at, is between private and public sector employment, where public-sector employment is not considered to involve a contract. This is the status of public sector officials in a number of European countries. The fourth and final distinction is between employment (working for others) and self-employment. The labour law of all European countries falls within this quadrilateral and is defined by comparison with unpaid work, training, the public sector and self-employment. One of the factors underlying current change is that all of these distinctions are becoming blurred. If we look closely, we can see that training now forms part of employment contracts and that, *vice versa*, entry to employment is playing a growing role in training courses. In particular, new techniques and new technologies mean that the separation between your private life and your work is eroding: employment contracts also involve your private life (parental leave, for example), while new technologies mean that you can work at home. This

is the first factor in the transformation brought about by economic, social and, of course, technical change.

The second factor (and a second transformation) is the change in the power structure. This change can be seen in the family, in politics and in companies. A wide-ranging legal analysis would show that the image of power (what lawyers used to call *potestas*) - whether this be of the father as head of the family, of the head of state or of the head of a company - has changed in a similar manner. Power is increasingly seen in terms of function. In particular, there is a progressive reduction or erosion of the hierarchical or pyramid-shaped view of organised power. This is particularly clear in the most successful companies. The largest companies are, however, still organised along military lines. In France, using military terminology, we talk about *cadres* (commissioned and non-commissioned officers, or executives): workers are trained, just like troops.

However, the pyramid concept has now been challenged by new power techniques. These are difficult to understand because, like all the changes I am talking about, they have two sides. The most productive and efficient new types of organisation are not based on the work of obedient subordinates. Business needs to be able to benefit from the creativity of working people, from the fruits of their freedom. So it is now facing a dilemma: how can it control, manage and continue to benefit from workers that it wants to make as independent as possible? I believe that this has led to a less clear distinction between employment and self-employment. In terms of employment, there are now contracts with agreed objectives and management by objectives. In legal terms, workers no longer have a duty to follow given instructions, but instead have a duty to achieve given results. The concept of assessment has been introduced: you are now free to work as you want, but you have to meet agreed targets. But, if at the end of the day you don't meet those targets, ...

Meanwhile, self-employed workers have seen directly contrary changes. In Europe most self-employment is in agriculture. The agro-food sector has invented labour management techniques that have changed the nature of employment contracts. Mainly as a result of *contrats d'intégration agricole des techniques de soutraitance* (agricultural subcontracting integration agreements), farmers have remained legally the independent heads of small businesses. However, they are subject to strong production pressures and, in return for a secure income, they have lost most of what was important to them when they were truly independent. What is true of agriculture applies also to the distribution sector. So, if you like, we have two views: on the one hand, the fictional employee and, on the other, the fictional self-employed person, who is actually a subordinate. The current health scandals concerning

agricultural products are largely due to the total transfer of the ownership of the materials with which they work from farmers and farm workers to the companies on which they depend.

So much for the general picture. I shall now consider a number of problems that have arisen since the report was first published. These include both some criticisms, to which I shall reply, and a number of translation problems, which I have discussed with Pamela Meadows and which are revealing of the problems of collaborative work.

The first concept we put forward was that of what we call in French a person's *état professionnel.* I do not think that this concept has an English equivalent. Pamela has translated it as "occupational status", but it is untranslatable essentially because of the concept involved. In order to obtain long-term rights, salaried employment is governed by a contract: for example, the right to continuous life-long training, which everyone agrees is becoming increasingly important. People in permanent employment have the right to access a company's training programmes. People who are not in permanent employment are, therefore, excluded from training programmes. This is where the concept of *état professionnel* comes in. In French, this concept is based on the fact that everyone has an *état civil* (civil status), which in turn means that you are a member of a group and that you have a nationality. One of the characteristics of this personal status, I believe, is the right of access to markets: the right to take part in trading within the community. This is why I am personally insistent that everyone should be paid a salary, whatever kind of work they do. This does give rise to a problem of social ethics, because it means that we are assuming that one section of society does not participate in economic trading. In my view, this position is, anthropologically speaking, incorrect. It won't work. But, if we admit that every human being at some point in his or her life will trade his or her work, then we are attributing rights that will very properly apply throughout human life. And this is what *état professionnel* is. It is something that applies throughout your life and, therefore, creates a right that goes beyond limited market agreements. It means, for example, that access to professional training becomes a guaranteed right and not something limited to people holding a permanent contract of employment.

This is where my second concept comes in, also discussed in the report. This is easy to translate, because it is already a term used in international finance and banking: it is *special drawing rights.* The idea here is that, during his or her working life, a person will probably be involved in several types of work. Within the labour market you could be employed or self-employed; you could then move to public sector work; and then you could spend time working with your retired parents or your children. So you can move between types of work and the problem involved with all this moving is to ensure that you are not locked into any single

category. Let me take an example. I've mentioned parental leave. Parental leave, which is massively used by women, can be a trap for women who come out of the labour market for a period of time, because they then have great difficulty re-entering. But, if they do withdraw from the market, they should be guaranteed a continuous income. The concept of *special drawing rights* now comes into play by offering everyone the option of temporarily withdrawing from market and employment constraints in order to exercise a freedom, while at the same time being able to rely on collective funding.

Let me give some concrete examples of what I mean. Probably, the first *special drawing rights* were the hourly credits awarded to trade union and staff representatives. These work as follows: you are a salaried employee, but you are working on behalf of all the workers and this gives you the right, within previously agreed limits, to withdraw from work in order to carry out another kind of work, which is representation. This is what all special leave is. I have mentioned parental leave, but it is also the basis for training leave. The idea of *special drawing rights* is not a formula. What is absolutely new about it is that it organises and builds on something that already exists under different names and headings in the laws of all European countries. It is an attempt to create a concept. I believe that we are seeing the birth of something new when compared with the legal basis of the welfare state. The provident or welfare state (although welfare is an extremely restrictive term), or the German social state were designed for the individual, because all individuals have to face risk, sickness, old age, death, *etc.* If a risk arises, there will be social solidarity to support you. A shared pot has been created on a provident basis so that the person at risk can survive that risk. What *special drawing rights* introduce is also financial solidarity, but its purpose is not to face a risk: it is to exercise a freedom. You are being given an opportunity to do something, within given financial limits. In return, the person drawing on those rights also has a responsibility. The universities know how this works. When lecturers take a sabbatical, they are drawing on special rights. If all they do during their sabbatical is drink beer, then they won't be granted another one. And they will only have themselves to blame!

My final set of comments is about collective action, which is little touched-on but which I think is important. We did discuss collective representation and collective bargaining, but there is not much on strikes. I think that “the right to strike” should be reviewed in the light of the assumptions made in the report. Our main assumption is that the framework within which we should consider labour relations is no longer just the "them-and-us" relationship you find in companies where the employer sits on top of the pyramid with all the employees beneath him. Networking and the erosion of frontiers are making companies think

differently. The right to strike and the right to take collective action should take account of this new organisation of work. Throughout the history of the labour movement, the type of action taken has always had to be adapted to match company organisation. Now new kinds of collective action merit serious study, whether they concern investments in the stake holding scenarios of the English-speaking world or types of consumer action in certain other scenarios.

One of the strong criticisms of this report, most of which have come from France, was along these lines: "In attacking the employee status, you are undermining and burying one of the great achievements of the workers and the trade union movement." I think this shows little understanding of history. History doesn't stand still. We have to deal with the technical and economic changes facing us. We should not forget that the central objective of the trade union movement was to free employees from the subordination and alienation inherent in the employment contract. Seeing the same people now defending life-long subordination as an ideal life seems particularly paradoxical to me. I think that we should look at the opportunities and risks involved in change and try to master them, rather than hang on to our old way of thinking which has been overtaken by events.

Chair

I shall now pass the floor to Richard Freeman, while asking you to comment also on this notion of social drawing rights. It sounds very interesting on an abstract level, but when I put myself in the situation of a company where, as an employer, I am already obliged to guarantee re-employment of a person who is on parental leave, for instance, that person doesn't have a problem coming back because the employer bears the costs of this existing social drawing right. This is exactly the problem that weighs on employment. So how in practice do you make concrete these proposals, which certainly sound interesting in abstract terms?

Richard Freeman

I want to start off with what I call the "Three Claims" and to discuss each of them in turn. First, a lot of people claim - it certainly was true in the US Dunlop Commission and it comes through in the Supiot Report - that the world of work is changing. I'll give you some

indication of the ways in which it is changing and the things that are causing that change. It follows on from the time when workers were subordinate to employers. (Alain kept on using the "Fordist" mode of production as an example.)

The second claim that underlies this Report and others of its kind is that our labour institutions had better change, or they could become obsolete. Certainly in the US and the UK, we hear about unions potentially becoming dinosaurs. Union people are worried about that and what the alternative might be for them. You also hear the same kind of discussion in the Continental European context, with some labour institutions being classified as fetters on the economy and as barriers to rapid increases of productivity or employment.

The third claim is that modest adoptions of EU institutions and labour laws will suffice to maintain the system. I hadn't realised that the Report had been criticised as being too radical, because in my view it probably didn't go far enough. But, having sat on the Dunlop Commission, I appreciate how any report from a group of experts that has then to go through a governmental bureaucracy will always tend to end up looking blander than the real thinking behind it.

Figure 1. The Three Claims

1. The world of work is changing from what it was when advanced countries developed their labor relations laws and systems.

2. Labour market institutions must adapt to these changes or risk becoming obsolete or fetters on the modern economy.

3. Modest adaptions of EU institutions and labour laws will suffice to maintain the EU socio-economic system.

Let me explore these three claims. I want to start by being critical of one aspect of this Report. It is not dramatic enough about the change in the nature of work. What we are really seeing is a movement from a world dominated by "manual male manufacturing" to a new "diverse digital tertiary" society. (I would have loved to have coined a third 'D' there, but I couldn't think of the right word in English!) This is a really gigantic change and it is being faced by labour institutions that were built up to deal with male manual manufacturing. The Report describes and analyses this shift, but I think that the change is much greater than it recognises. The Internet and digitalisation are making information such a critical commodity in our economies that, as you know, almost all of US productivity growth now

comes from one sector, the IT sector. We have micro- and nano-changes going on that give us greater control over matter. If we look ten or fifteen years down the road, all this is going to have immense effects on the way people will be working.

Globalisation we understand. However, I've been struck by the "feminisation" of the workforce. The Report devotes a chapter to issues of male/female discrimination and women engaged in household activities, but I think that the social and work changes we are seeing here are really significant. In the US currently one third of women earn more than their husbands. Forty per cent of women university graduates earn more than their husbands. No European country has yet reached that level, but it is going to happen. In the US today, among new graduates, there are 20 per cent more women than men. In Spain, it's 50 per cent more. Once you're graduating more women than men from universities, you are really changing the whole nature of the job market. This is not the old question of how to treat women working in the household. This is a question concerning the totality of relationships within the family. This huge issue was not really stressed in the Supiot Report, or in the Dunlop Report for that matter.

There is a paragraph of discussion in the Report about the problem of pensions and the aged, but it is not presented as one of the major potential crises facing some European countries. The Report does contain a good deal of discussion about changing work relations, on self-employment and also on "intermediate workers" (people correctly described in the Report as not really entrepreneurs, but not really employees: independent, but not really self-employed either). I shall come back to this and to the question of what kinds of wage contract or relationship will be appropriate in future. Also, in the EU in most contexts we are seeing a great weakening of centralised bargaining, which creates a greater problem for the EU institutions. With a general decline in their strength, trade unions are not quite sure what path to take into the future. At the same time there are greater problems with state regulatory power. All these issues appear in the Report at various places, but they're not "red flagged" as serious problems.

Figure 2: Transformation of Labour:

MMM (male manual mfg) –> DDT (diverse, digital, tertiary)
Demand:
- **Technological change**
- **Internet & digitalisation –>Information**
- **Micro & nano –> Control over matter**
- **Globalization –> competition**

Supply:
- **Feminisation of work force**
- **US - 1/3rd earn more than husbands**
- **Education**
- **More women than men new graduates**
- **Aged**
- **Dependency ratios**

Work Relations:
- **Self- /temporary employment**
- **Intermediates between sales/wage contract**
- **Small firms**

Labour Regulations:
- **Weakened centralised bargaining**
  - **Union strength**
  - **State Regulatory Power**

Next, looking at the Report as an economist, there is something missing. Presumably because it was a report by labour lawyers, it does not focus on price issues. The question of compensation is not discussed in this Report at all. As well as looking at changes on the quantity side, we have to look at what's happening on the price side. I'm going to present US data on profit sharing and I realise that I am commenting on developments that have gone further in the US than in Europe. But the UK is probably second in this league table and the UK government is about to embark on a programme with fiscal incentives to encourage this activity. France, too, has been in the forefront in introducing legislation for company profit sharing arrangements and we could also look at the Pepper Report, which addressed the issue at the EU level.

It may help to look at this as a different perspective on what Alain was saying about a blurring of the capital/labour distinction. More of the risks of which the Report talks (the risk of death and all the other things) is falling onto workers and, as a result of this, workers are becoming more dependent on capital for their income. This shift is not going to show up in the share of capital in national accounts, because this is put down as income from labour. But let me give you an indication of how big this now is in the US and how dramatically

things have changed. Currently about 25 per cent of the workforce is involved in some kind of ownership of its own company. Employee Stock Ownership Plans (ESOPS) - the equivalent of All-Employee Share Ownership Plans (AESOPs) in the UK - have been widely sold and now cover 8 per cent of our workforce, up from basically zero in the early 1990s. About 10 per cent of the workforce has also taken advantage of share discount schemes under which American companies sell employees company stock at a discount on the market price. That, of course, itself represents an immediate profit.

This means that today a quarter of the workers in the United States have a deep connection to their company through *ownership,* either by profit sharing or by gain sharing. Profit sharing is pretty much related to the overall performance of the company; gain sharing is something more narrowly linked to your actual workplace. There's an overlap between these two kinds of programmes and this is still very much an American, rather than a European, phenomenon. But, if in Europe you tackle the growing pension problem by causing people to buy private pensions, you will get the same result. For the US, I accumulated two data sets and, after adjusting for overlap, came up with the estimate that roughly half the American workforce (45 per cent on one data set and 54 per cent on the other) has a direct connection through the price mechanism to their company in a way that was inconceivable under the old Fordist relationship.

I should add, just as a footnote, that the Ford Motor Company and the UAW Union are in the forefront of this development in the United States. This year each blue-collar automobile worker at US Ford got an $8,000 profit-sharing cheque. It would make a nice little story to go back to the old Fordist way of doing it and to compare that with the new way the Ford Motor Company, in the US at least, is operating.

A final point. Today, 30 per cent of the equity represented in the US stock market is owned by pension funds. Taking all this together, I would say that there is a great "price-side" blurring of capital and labour in the world of work, which the Report does not deal with because it is not price-oriented. This blurring of capital and labour really requires new employment relations and new labour laws. But the requirement goes beyond new labour laws. If I'm a worker in one of these settings, I want to look at the financial law as well. I want my trade union or my representative to check how my company is defining profits, because my pay depends upon what those profits are. I want to make sure that the company isn't setting up some dummy corporation out there to siphoning off the profits and then telling me: "Gee, we've got no money for the profit-sharing plan." So I want to extend the labour law in the sense of bringing in financial issues of this kind that previously we would

have thought no worker or union would care about. This is my major addition or comment to this.

Figure 3: Missing Elements: Compensation Tied to Company Performance/Pension Fund Ownership of Shares

Blurs capital/labour distinction; shifts some risk to workers and increases their dependence on capital for incomes

EXTENT OF SHARED COMPENSATION IN US
(Percentages of private non-agricultural work force)

1. STOCK OWNERSHIP PROGRAMS	**25%**
ESOPs	**8%**
All Employee Stock Option Plans	**8%**
Individual Shares at Discount	**10%**
2. PROFIT/GAIN SHARING	**25%**
3. DEFINED CONTRIBUTION PENSIONS WITH "SIZEABLE" AMOUNT IN COMPANY STOCK	**11%**
TOTAL (ADJUSTED FOR OVERLAP)	**45%**
WORKPLACE REPRESENTATION & PARTICIPATION SURVEY	**54%**
PENSION FUND OWNERSHIP OF EQUITY (1995)	**30%**

The Report deals with a bunch of what I call "Who's and What's". As a matter of fact the Dunlop Commission considered a very similar bunch of worries. Who is the real employer? The answer in the Supiot Report was to adopt a community-wide definition and apply the law to "intermediates". I thought that was right on target, though it's not going to be so easy for some of these intermediates. In the US context we discovered that under different laws the employer is defined differently. Under one law, for example, if a worker came into my workplace and got injured, I was responsible. But under another law, if the worker came via a subcontractor, who was paying his wages, I was not responsible. I assume the situation must be very similar in a European setting. It is very important to get at who the real employer is.

There's a wider issue concerning the real employer. I subcontract some of my work to the Sleezo Company, which is a real low level operation. It may be use black market workers; it doesn't treat people well; it breaks the law all over the place; but I just smile and say it's not my responsibility. I was at Intel, the major IT company, a couple of years ago

and it was very upset. One of the unions was protesting about how they were treating the gardeners. The company said: "But they're not our gardeners. We subcontract gardening and we don't want to know about anything going on." Well, the real employer-- in the sense of determining how much the subcontractor can pay the gardeners - is the Intel Corporation. I think this is a quite critical point and one on which the Report is correct.

A second "who" issue implicit in some of the discussion in the Report is the question of who *owns* the job. In the US context, the employer always owns the job and the same holds in the UK. You, the worker, may have some rights, but the employer can get rid of you fairly easily. In the EU context, this is not the case. The worker has much more ownership of the job and it's tough to get rid of him or her. This issue will come up at once in the context of the new special drawing rights. Here a missing element in the Report is any answer to the question: who's going to pay for these special drawing rights.

As I understand the concept, there's to be some fund that you can draw on at various times in your life to finance non-paid work activities and that right to draw runs for your whole life. The money, though, has got to be put into that fund from somewhere and there is no easy solution. It's not easy, in part, because there's a real problem of what to do about different generations. This is a problem that also occurs in relation to shifting social security systems.

A "what" question is what is work time? Let us suppose I have a great idea while thinking in the shower. Does my employer have the right to that idea, or can I go out and patent it myself? It's an interesting question, particularly for university professors! You may go to work in a lab provided by your employer, but the idea came to you in the shower. The point here is that digitalisation and flexible working are radically changing the meaning of work. You can certainly say to your employees: "I don't care when or where you do it." We tell our computer people: "Work at night, work at home, I don't care. Just get the thing done and take as much or as little time as necessary. If you get it done quickly, go off and have a good time." If you are doing work for your employer when thinking in your shower, then the whole concept of work time is changing.

The Report does address this point and again comes up with the idea of special drawing rights. Again, I respond that it doesn't really say how all this is going to be paid for and how we're going to incorporate into the notion people who are not in the covered sectors. The example that Alain gave of "special drawing rights" for a trade union representative is one we all know can be covered in some fashion, but we're not talking about a union representative or a small number of women or men on maternity or child leave. If you're

talking about the whole workforce, then the practicalities have to be thought through with great care. This was outside the terms of reference of the Supiot Report, but it is still the issue.

Two other comments in this area. What role is there for collective activity? Here, the EU has something that the Report stresses. I would have stressed it more, because I see it from a US perspective. We don't have the EU system of Works Councils, which is extremely valuable and provides ways of dealing with these problems. But there still is the difficulty of how you connect these things up and coordinate them. I'm not sure that is going to be as easy as is suggested. The same thing occurs with the state regulations. Yes you may want to have international guarantees for things, but there is a real problem of monitoring and connecting up.

Figure 4: Who's And What's Problems

1. Who is the real employer?
Solution: Adopt community definition
Apply law to intermediates

2. Who owns the job?
Solution: Active security; Special drawing rights
Problem - Who pays for funds?

3. What is work time?
Current: Thinking in the Shower
Lifetime: Students Work; Retirees?
Solution: Rights implemented through CB; Special drawing rights
Problem - Who pays? How to incorporate non-covered sectors?

4. What role for collective activity?
Solution: dual system; works councils advised by central organisation
Problem: Link to global setting: Need EU/world coordination; unions must change

5. What role for State regulation?
Solution: International Guarantees
Problem: Monitoring - Works Councils

Figure 5: What the Market is Doing: Complementarity Between Incentives and Decision-Making

	Full Sample (%)	With EI (%)	Without EI (%)
Any Compensation Structure	**53.8**	**66.1**	**33.9**
Performance-Related Pay	**41.9**	**53**	**37**
Profit-Sharing	**28.9**	**39.9**	**24.1**
Gainsharing	**26.2**	**32.8**	**23.3**
Ownership	**29.6**	**40.2**	**25**
ESOP	**23**	**34.5**	**18**
Employee Owned	**11.2**	**13.1**	**10.4**
Employee Involvement	**29.9**	**100**	**0**

Source: WRPS Survey, in *What Workers Want*

Now to some final comments. From my very US-perspective, I want to ask: "What is the market doing in all this?" Putting aside what the law can do, is the market, is the business community providing any answers or solutions? In the US we're seeing a linkage of companies that have employee involvement (EI) systems with some form of performance-related pay or employee stock ownership. Figure 5 shows the percentage of people with some form of compensation structure that ties wages to the performance of the company and whether those companies also give workers decision-making rights.

This is changing the nature of subordination. It occurs in the US in the context of "yes we break the subordination to some extent, but we also pass on a risk". Also, the way people are paid is different. I think this is a tremendously different kind of labour market. So what we're seeing is that the companies that go down the route of greater employee responsibility, team work and so on, also have either profit or ownership incentives tied to that. This is what I see as the leading margin of new work.

Figure 6: New Versus Old Work And Welfare Arrangements

	LABOUR MARKET
Wages	
OLD	**Fixed Hourly/Monthly Pay**
NEW	**Variable Compensation Related to Profits/Stock Ownership**
Regulations	
OLD	**State Command/Control**
NEW	**Works Councils /ADR Systems**
Decisions	
OLD	**Hierarchical Boss**
NEW	**Employee Involvement/Teams**
	WELFARE STATE
Welfare	
OLD	**State safety net for jobless**
NEW	**Benefits tied to Work** **Social Drawing Rights**
Retirement	
OLD	**Social security/private defined benefits**
NEW	**Defined Contribution**
Education	
OLD	**State provided schooling**
NEW	**Loans; Vouchers**

The last figure summarises how I see the changes in these arrangements. The labour market is moving from the old system of fixed pay to variable compensation based on profits and stock ownership. Here I'm not sure how well the EU is suited for dealing with the issues. On regulations and the move from what I label the old state command and control, I think that works councils can really deal with the issues very well. The US has different dispute resolution systems, which reflect our preference for decentralised decision taking. The Dunlop Commission was very uneasy about them, mainly because of my worry that, without unions in the work place, a disputes resolution system set up by management would not be evenly balanced. Again, I think that the EU is better placed to create fair and balanced systems in this field. The old system based on the hierarchical boss, who gives orders to those below, has to change with the new system based on employee involvement and teams,

because the boss doesn't necessarily know what's going on in the agenda setting process and the basic management information lies at a lower level. That's the underlying change.

To end, I want to say something about changes in the welfare state, because they are connected and because they make things a little difficult for the social drawing rights, which Alain and the Report are pushing. Under the old welfare system, we had a basic state safety net for the jobless. The Swedes had more of a system where benefits were tied to work. The US has bought into that concept to an extreme degree, so you now get more and more benefits and negative income tax, if you work. For retirement, the old system was based on the standard social security provision, plus privately financed benefits. We're now shifting towards defined contributions, with each worker having his or her own fund. That's a big change. On the education side, which is not mentioned in the Report, the State still provides schooling, which I regard as part of the old model. Under the new model, loans and vouchers programmes are bringing market forces to the system. The proposal in the Report for social drawing rights is consistent with this trend. But how the financing for it is to be achieved is not clear.

I'm very happy to hear that the Supiot Report has had more effect than the one with which I was involved. Our Report died when the Republicans won in the Congress. One of my friends from the business community called up and, sort of chuckling, said: "We're going to be writing the new labour laws for the US now." I replied: "Well, actually, we'll end up with no new labour laws, because the unions have enough power in the Congress to veto anything you want and you obviously have enough power to veto anything they or the Clinton administration want." Indeed that was the case until last week, when we had a striking development involving doctors. Our doctors have great difficulty in unionising, because most of them are independent practitioners. Now they are facing a situation where they are working for Health Management Organizations (HMOs) and, suddenly, they are employees, not independent practitioners. In response, our Medical Association wants to become a real trade union and, in order to do that, it has to have a legal exemption to allow it to form a cartel. That exemption has just passed in the House of Representatives. Of course, many conservative Republicans voted for it, because these doctors are their constituents. Others voted against, saying: "Oh, my God! This is going to help the unions." But doctors are very powerful and contribute lots of money to political campaigns. Doctors don't need that much help from the law. It's the poorer workers that one has to worry about in this.

Chair

These have been two interesting and very different comments. I have one observation, which wasn't touched on by either speaker. When we Europeans talk about regulation, be it by collective agreements or by legislation, its purpose is not only to protect employees. When you look at regulation from a company point of view, it is also to reduce transaction costs by creating a stable framework. When we reformed our collective bargaining system in Germany, this aspect came out very clearly. Small companies, especially, said: "This has all got too complex for us. We want some simple rules and we don't want to have to negotiate everything all the time with everybody." Maybe this is something that needs to be discussed further.

Chapter 2. What Do the New Forms of Employment Mean?

Chair - David Marsden

We shall now discuss the issues raised by Alain Supiot and Richard Freeman. We are very lucky to have with us three distinguished commentators, who have been playing a prominent part on the employers' and the unions' side of this debate.

Dominique De Calan

I should also like to speak in French and thank you for allowing me to do so. Being a Breton, from the region you call Little Britain, I wondered if Gaelic might have served as a means of communication, but no translator was available!

After the previous presentations, I am somewhat nervous about speaking for three reasons. I am neither a professor nor an economist. Nor am I part of the Richard Freeman's "tertiary digital world". I am an industrial peasant and, therefore, in the process of becoming extinct. Specifically, I represent an association of delinquents. Why delinquents? Because for all French employers labour law and regulations concerning the social partners have become so complex that none of us can observe them. We have reached the point in Medef, our national employers' umbrella organisation, where unless you have been found guilty of the breach of at least one regulation, you have little chance of getting onto one of its boards. I say this because it is a point that is insufficiently recognised in the presentations we have had. It is a fact that today, particularly in France, many employers, above all owners of small businesses, are tired of being permanently in the situation of not abiding by labour law, of not abiding by agreements, because they have become so complex that I defy anyone to come to France and abide by them.

As a result, with the global economy in which we find ourselves, we are losing markets. I was involved in the loss of one possible American capital investment in Finistère

in Brittany because the company came to talk to me about the 35-hour week. I explained to him: “Don't worry. It will be all right.” But the potential investor, coming to a country where the regulations you have to observe have such fluid boundaries that basic economic parameters cannot be adequately forecast because no one will say what might happen, is faced with a major non-competitive factor in a the greater part of southern Europe, particularly in France. I want to stress this point, because we urgently need a clarification of the differing responsibilities between law and agreements, between individual contracts and agreements, between private and public life. The present situation cannot continue. A considerable number of small and medium-sized businesses today have no protection against claims for compensation as a result of travel accidents or accidents at work, which could result in them being exposed to liabilities so large as to wipe out their balance sheets.

Following on from small businesses, I should like to say something about the situation of large companies. When Richard Freeman spoke about the profound change in the relationship of wage earners, or at least a proportion of them, to the ownership of capital, in my view he did not go far enough. I have already been struck by how wage earners in France, from the moment they become senior executives or technicians, are no longer in favour of government measures that might reduce profits. Let me give some examples. If I am employed as senior executive, I do much the same job in the United States or in Europe. Increasingly I compare remunerations. I can do so easily by Internet or Intranet. I have stock options that are more or less comparable, but for the one they come with only the lightest regulations, while for the other the regulations are extremely constricting. So more and more in the years ahead, especially in the new economy, if countries do not become competitive in the way in which they treat these other forms of remuneration, they run the risk of seeing an acceleration of economic migration, of seeing wage-earners themselves organising their tax domicile so that they are paid in the country most advantageous to them.

I should like to put the following questions in relation to our general subject. How can one improve employment? How can one prepare these new work contracts? First, I want to insist strongly on a point that has not yet been made. In any case in France, the new modes of working relationships bring with them a major psychological problem. The breaking of a work contract always involves a relationship of blame. “Oh, dear! He's been laid off, so he can't be much good.” Except in the case of an unusually severe downturn where a company becomes insolvent, as soon as this translates into what I modestly call “external mobility”, there is an immediate reaction of guilt.

This is an extremely serious problem. The smaller the enterprise and the more one is in a "rural" (or at least a non-urban) setting, the greater the extent to which one of the principal brakes on employment at the beginning of a period of growth is the fear of taking on Pierre, Paul, Jacques, or Jean because inevitably he is the son of my cousin or of my baker. That is to say, he lives in my social environment. If later it turns out that I have to fire him, how am I going to explain to my friend that I am no longer going to employ his son, his daughter, his wife or his cousin? So what is one of the principal motivations for the development of the legal concept of what is called casual work (with short-term and interim contracts) in small and medium companies? It is in order to be ready for a break that does not bring with it the psychological link with a feeling of having to label workers as good or bad. On the other hand, I am struck when I see the analysis that some people make: "Good heavens! In company X, three people have been made redundant. Look out, things must be very bad. Let's cut back on our lines of credit." It is, therefore, vital in the context of this new economic relationship, particularly for us French, to look for a completely different approach and one that is as positive as possible towards new forms of work, whatever they may be.

As an example, at UIMM (the employers' association for the French metal industry) we have been working for five or six years on the basis of two agreements - a sectoral agreement and a national agreement - which incorporate what I call "open-ended contracts with a fixed break clause". Why the indefinite duration? Because of my uncertainty. I am about to attack a market, say, in the Czech Republic. This market functions well and responds, for example, to a call for tender. I have in mind some maintenance projects or industrial plants in a particular sector. The contracts are regularly renewed. For a small or medium-sized company, when will the business cease? Particularly for a small industrial enterprise manufacturing for export, the answer will be the day that the contract is lost. Thus the contract is not for a fixed period. It is not for one or two years. It is for the whole of the venture, for the whole of the contract itself. It is for the whole life of differentiated contracts, as we call them in our somewhat "social partner" jargon. I think that this is an extremely promising way forward, because it transparently corresponds to reality and to contract law with known rules. The arbitrary quality is removed: I like him/I don't like him; he is small/he is big. By contrast, it corresponds to economic reality, where the future is uncertain but where, when it comes, it brings with it compensation: a break in employment where the terms are set out in advance and negotiated and transparent.

Some of you will know that this model has been inspired by what we call in the building industry "project contracts" (*contrats de chantier*). You hire someone for the

duration of the building work. Now in any case in the occupations involved in metal industry, whether in the creation of new products or going further, we know that technologies are accelerating more and more, so that the idea of a work site no longer necessarily depends on a single order, but can also depend on a technology itself.

There is a second very important evolution. France, in any case, is a country where the social partners are not thought of as being fully adult. We do not have the right to legislate between ourselves. We do not have the right to alter things between ourselves. We are permanently under the authority and depending on the approval and authorisation of the State. Those of you who have studied French law a bit will know that a collective agreement has at least to be legally approved and its coverage may be extended. Now that can sometimes take a very long time. Two years ago in the metal industry, we invented new kinds of employment relationship to allow from our point of view reconciliation between autonomy and liberty, depending on the classification to which an employee belongs and the competences he or she holds. In the contract it is the enterprise that, in terms of the autonomy granted to it, has the famous "bond of subordination" that we have already talked about and will be regulated at different levels. There are five types of contract, each providing for a link between subordination and autonomy. Why? Because we live in an increasingly technological world.

Let us take the example of a maintenance worker, who previously always did his maintenance at his workplace when the whole of his output belonged to the factory. He was in a line of subordination that was pretty clear with pretty clearly defined tasks. Today, whatever his level of technical expertise and whatever his level in the hierarchy, he is someone who is totally autonomous. He goes to the client. He has to decide whether or not to authorise the use of the lift, to decide whether it is safe for those who want to use it. He is totally autonomous. So it is clear that a single regulation, such as one governing the hours of work for all technicians, is completely idiotic. Which of us in his position, with people trapped in a lift on the eve of a long weekend, would say: "That's it! My working week is over." Of course, his work does not end until the task has been completed, or at least until those involved are safe.

Well, we had to wait 18 months. I do not exaggerate. The agreement was described as "virtual" because of the complexities of deciding whether the parties were empowered to decide whether the necessary autonomy has been granted, with all the consequences that brought for weakening the bond of subordination, saying: "I'm not there; it's not my problem." You see, the question of autonomy is always presented as a freedom, but it also

protects employees by offering them an organisation and you cannot blame them for this. It took 18 months for our agreement to advance from being "virtual" to being "semi-approved", and so on.

I should like to come back to two points that have already been made, one of them by Alain Supiot, and then I shall finish with one point that for me is very important.

You have used the words: "A worker should be required to produce results." Good lord! How shocking it is to insist that someone should produce results! Those of you who create things, who write, will you allow someone to impose on you a dreadful novel or listen to stupid lectures just because their authors devoted a lot of time to them? Surely not! In France, in our *cocorico* (cock-a-doodle-do) country, where we are very proud of our châteaux, we only preserve the most beautiful. Are you ready to pay the same price for "canard au sang" whether it is I who have cooked it, or the Tour d'Argent? It's still the same "canard au sang". So, when you come to accept that at least those of us involved in technology and the new economy are just as creative as painters and writers, that we create with our hands just as much as you with your minds, then you will concede the right to be treated in the same way to all those creatively engaged in the workings of an enterprise. Otherwise, we are heading for catastrophe. In this situation we accept that we must eat everywhere, which for me is unacceptable, not across the Channel but across the Atlantic, where to make sure that everyone eats the same, everyday we are served oven-baked chicken for lunch and we are made to believe that it has been grilled by adding a few dashes of Worcester sauce so it is germ free.

Personally, I don't want food like that. M. Bové is right. The denial of such creativity is fundamental. It undermines the autonomy that in fact leads automatically to producing the outcome. The fundamental thing is respect for true manual work, manual work which the Germans do much better than us.

My second point is that I am extremely uneasy with all this talk about life-long learning, as if it was an established fact at the European level. Alain Supiot has spoken very intelligently about knowledge work. But I put to you a serious question. Does it have to be remunerated? My answer is no. For, if you reward knowledge work, you create social injustice. Why? With globalisation, in a world where, more and more, time is valued just like objects that you buy, with the customer going for the cheapest, labour productivity acquires a huge value. So, if I educate people and pay them at the same time, I shall only be offering education to those with high productivity and high "value added". That doesn't bother me, because working time itself is not important. And everywhere in the world I shall

also exclude those with a low “value added”. At that point, investment in replacement and substitution become profitable. So where is true social justice in life-long learning? It lies in organising free education, with the share of responsibility for providing the resources to be negotiated: part the public purse, part the employee and, possibly, part joint (employers and unions) bodies. But this education must not be offered during working hours. Otherwise you will be responsible for excluding the most underprivileged.

What is more, all reports confirm this view. For each $100 spent on education, $50 goes on the salaries of those being trained, $20-30 on living expenses, food and transport, leaving hardly $30 as productive investment. If I subtract from that dropouts, teaching that is sometimes pretty mediocre, exhaustion from travel, etc, the true profit is hardly $10. So anyone not capable of overall productivity of more than ten times his added value will be excluded.

You do not have the right not to claim what we do tacitly in France, where we place such a premium on the diploma, for which the student is not paid. The student's family has to take care of that. We do not have the courage to say that an education system that is fair, balanced, which re-deals the cards, is an education system with free access, which could be available thanks to technology: but definitely not in working hours. The less I work, the more I am “subordinated”, as you say. In a France, which works 35 hours a week, I shall have a great deal of time to educate and advance myself!

Reiner Hoffmann

I'd like to focus mainly on five points and to reflect also from a critical trade union point of view on what the reform of employment could mean.

The first aspect is related to wages and collective bargaining. My second aspect will be education and further training. On the third point, I'd like to make some comments on new types of employment and what the Supiot Report calls the "Activity Contract". My fourth point will be then related to the third chapter of the Supiot Report on time and work, concretely on a new path for working time policies. Finally, I shall make a few remarks on the modernisation of trade unions, especially on how they can meet the challenges resulting from the restructuring of the labour market.

First, wages and collective bargaining. I think it's right to conclude that, in high productivity sectors, for example in IT and chemical sectors and the like, wages are not really the problem. I think that the real problem we are facing, also in Europe, is the problem of the working poor. If we look over the last five or six years, the results of collective bargaining in Europe mainly follow the recommendations of the European Commission, even if there is no causal link. In other words, wage agreements have been below productivity gains, even further below than the Commission recommended in its famous 1993 White Paper on Growth, Competitiveness and Employment.

The problem centres much more on what has happened in the low productivity service sector and here the issue, underlined by the European Commission since 1994, is how to reduce non-wage labour costs. For example, in this sector in 1981 non-wage labour costs were 35 per cent; by 1995 they had risen to 42 per cent. It is sometimes surprising from the European perspective that the European Trade Union Confederation (ETUC) supports a policy of reducing non-wage costs. This is not necessarily the same as a low wage sector, though of course we have to take into account different levels of productivity and the fact that new employment could be created in the service sector.

Another problem facing us (causing trade unions to be more flexible in practice than in the public statements) is that some companies are in economic trouble. In Germany, for example, for a number of years we have had collective agreements with so-called opening clauses. Companies have not often made real use of such clauses, perhaps, for two reasons: they have to inform the workers' representatives and to consult them in coming to a solution at the company level, which then has also to be accepted by the trade unions. But this is an example of a kind of flexibility and a kind of decentralisation. All over Europe, now, we are faced with pressure towards the decentralisation of collective bargaining. In many cases such decentralisation makes sense, so long as it is negotiated. In order to negotiate in this decentralised way at the company level, employee representatives need information and consultation rights.

However, the circumstances of the European single currency faces trade unions with the necessity of coordinating their wage policies much more than in the past. Here I do not think that differences in collective bargaining systems are really an obstacle. Trade unions are not looking to establish a European-wide system of collective bargaining. I think that would not be a proper objective. But, if trade unions within the monetary union are to avoid pressures causing workers to compete with each other in the low wage direction, then they will have to increase their coordination. This could, for example, lead to some formula for

making sure that there is a full compensation in wages for price inflation. This has been more or less the case in recent years, though real incomes were not protected in all countries. But this goes beyond just collective bargaining. Productivity gains should not only be the basis for higher salaries and wages, but they should also secure or create new jobs and provide, for example, for further training and education and for innovative working-time policies, *etc*.

On the second point I can be very brief. It's quite clear that the transformation of work makes it necessary for us to implement new measures of further training and education. There has been a very long debate about lifelong learning. You can look back, for example, at what the ILO in Geneva recommended in the 1970s and see that not very much has been done. The social partners, obviously, have specific responsibilities in this field at the company and sectoral level. But we should also consider the possibility of a European framework agreement on lifelong learning and on further training, as has been proposed by the ETUC. This should not be a highly centralised structure, but a framework that could then be implemented at the regional or company level.

The next point is much more crucial for trade unions themselves.

The question is how to shape the new types of employment and how to make sure that they are not becoming unnecessarily precarious. As we know, part-time work is increasing, as is self-employment. But "agency work" also involves new kinds of employment relationships. Coming from Germany I can say that, in the past, trade unions were perhaps too opposed to these new forms of working, especially part-time work. They didn't take into consideration the fact that part-time work could sometimes be of interest to employees as well as employers. The Netherlands is quite a good and frequently quoted example of a country where part-time work was regulated very early by collective agreement and was not opposed as such by the trade unions. As a result, trade unions in The Netherlands organise many more part-timers than in other countries, especially Germany.

The question for trade unions is will they be able in future to offer specific services for those involved in such new types of employment and will it be possible to develop bridges between the different types of employment? For example, there has been a lot of discussion on whether part-timers should have the opportunity, or the right, to come back as full-timers. Equally, what will it be like for people who have been self-employed for a couple of years when they choose or are required to return to the full-time labour market? Trade unions have to think out how to build such bridges and what specific services they may be able to deliver to those involved.

The Supiot Report talks a lot about working hours. I think that trade unions have partly learned that nowadays the issue is not just about a reduction in the working week. We have to look at the working hours issue much more broadly and discuss it in the context of the entire working life. (Will it become possible to establish some concept like the hours in a working lifetime?) We have made things difficult by discussing different elements of working time in isolation, without relating them together (not only part-time work, but also sabbaticals, other forms of paid leave, early retirement, further training, *etc.*)

If you look into the reality of the traditional employment relationship, it is based on a rough average of 70,000 hours spread over an entire working life. In practice, I think people work many fewer hours than that average, taking into consideration that they may be unemployed several times, perhaps for several months, during their working life and that older people may have periods of part-time working. Here I think that we have to develop a flexible concept that takes into consideration the whole of a working life by making links between social security systems and active labour market policies and collective bargaining.

I shall end with a few comments on what this all means for trade unions. As the Supiot Report says, trade unions are one important actor in the labour market. Within trade unions themselves, there is a quite evident acceptance of the huge need to modernise; and to modernise not only their structures, but also their policies. In the future, trade unions will have much more to play the role of moderators in shaping procedures and processes and they will have to offer concrete services. In relation to active labour market policies, we should think about offering services also to the self-employed and to those who are not actually self-employed, but depend entirely on one client or one big company.

We should not simply resist such developments. We must not ignore the risks, but should search out the new opportunities that they give us in order to find new forms to shape such processes. To achieve this, trade union structures will have to be much more decentralised than they have been. For example, today's trade unions have not met the expectations of those working in small and medium-sized companies and, as a result, have failed to recruit there. In my view they have, at one and the same time, to strengthen their effectiveness at the regional level and to address their policies to employees in small and medium-sized companies. They must not just develop big bureaucracies at the European level, but need to integrate Europe and European affairs much more systematically into national trade union policies. They also have to accept the need to adapt their structures to the requirements of the new economy. I have some doubt as to whether they are doing so and so does the Supiot Report. If you ask about the logic behind the process of trade union

mergers that we see going on today in several countries, we discover that it usually has nothing to do with the new economy. It has very much to do with declining membership and the resulting financial problems. For trade unions this is the wrong approach to the future and we should reflect on it.

Pamela Meadows

I want to comment on the Report under three broad headings and then to reflect on one issue that came up when Alain Supiot and Richard Freeman were speaking and which I think we might have dealt with better. The first broad theme is the strength of economic and social forces. The second is how far does the legal framework act as a constraint. The third is the importance of history.

In terms of the economic and social forces, I think one of the striking things we all found when working on this Report was the extent to which common phenomena were emerging in different countries, despite their different legal frameworks, different political philosophies, different types of trade union movement and different industrial relations traditions. In spite of all of those differences, the same issues and the same phenomena were emerging. So something quite interesting and quite powerful has to be going on for this to happen. One of those interesting issues was a shift in the status of people who work in the public sector. In many countries, they haven't had traditional contracts of employment. They've been seen as office-holders or servants of the state. They have privileges and responsibilities. On the whole, they don't get very well paid, but they do have good pensions and that has always been the sort of bargain underlying their work. Virtually all European countries have now put civil servants on standard contracts of employment. There has been a marked shift in the status of public employees, making them much more like other employees, with the State seen simply as one contracting party and an employer like any other.

Next there has been a huge growth in the number of self-employed people who have neither tangible business assets - a farm, a bar, a taxicab - nor employees of their own. Typically, now, in most European countries about three quarters of all self-employed people don't have employees and many of them don't have tangible assets either. They're simply offering their labour; that's their asset. Across Europe, the old image of the self-employed

person as somebody who has a tangible business is simply no longer true. That is one of the things that has led to the emergence of these people who are in this margin between being employed and being self-employed.

There have, also, been very clear shifts in the balance of the employment relationship. Very frequently employees have greater knowledge and skill levels than their employers and that by itself changes the nature of the power relationship, even if nothing else is going on. Employees are expected to use their own initiative and judgement in carrying out their job. If you think about it, this is a reversion to the way that work was done before the Fordist production line, which turned jobs into tasks. Before the production line came along, people had a responsibility to deliver a particular set of outputs and had reasonable amounts of discretion over how they did it. We now seem to be moving back much more towards that position. Employers have begun to abandon the social obligations that have traditionally underpinned the employment relationship. For example, they have become much more willing to get rid of their workers over the age of fifty. They have become less willing to continue to employ people whose productivity performance might not be what it was five, 10 or 15 years ago. In the past, they would have acknowledged the falling productivity, but would still have felt that there was an ongoing relationship with this particular individual. That feeling seems to be going, if it hasn't completely gone.

But managers, too, have become just another group of employees. In the past, the legal and contractual framework that confronted managers was very often different from that which confronted other sorts of employees. Now they have the same sorts of contracts of employment as everybody else. So you could argue, on the one hand, that discretion and responsibility are being pushed down a long way in the work force, but at the same time you could argue that managers have become proletarianised in that their status has really become the same as that of everybody else.

Moving on to the legal framework, the law will always find it difficult to prevent willing buyers and willing sellers from concluding agreements that suit their own needs. This is particularly the case, if there's widespread public tolerance of the arrangements in question. So stamping out prostitution and prohibiting the sale of alcohol will always be very difficult, because there will always be willing buyers and willing sellers in these markets. There will always be particular aspects of the employment relationship that suit both employers and employees, even though the legal framework doesn't encourage, or indeed permit, them. The issue of the 35-hour week in France, which Monsieur Calan raised, is precisely such an example. Where both employers and employees want to have an

arrangement, which is not based on a rigid 35-hour week but which introduces flexibility and allows people to work more hours where necessary, those arrangements will exist. So long as there are advantages to both the contracting parties and so long as the potential damage being done to third parties is sufficiently minimal that they really don't care about it in practice, the law is not going to constrain the sort of relationships that people choose to enter into.

Next I want to make the point that, if we ignore history, we can draw false conclusions. Take the employment relationship in Europe. It developed out of the annual contract for servants, because, as you know, employees were servants. They were hired on particular days of the year and at hiring fairs. They were obliged to stay for a year and the employer was obliged to pay them for a year, which meant that seasonal factors were smoothed out. Although at harvest time there was more work to do than there was in the depths of the winter that was acknowledged and was part of the ongoing relationship. In essence, the employers were absorbing the risk of the seasonal patterns. But then, as employees wanted to live independently, they also wanted to develop their own lives. They wanted to work and to have waged employment and at the same time to develop a family life. So shorter employment relationships developed - day labour in agriculture, for example - and people were more frequently hired for shorter periods or by the task.

Essentially, we are seeing now exactly the same sort of process that European countries went through in the 18th and 19th centuries. We now also hear a great deal about the increase in women's participation in the labour force and of comparisons with the "traditional" position. Yet, apart from a very short period in recent history, it is clear that women have always played an active role in economic activity. They haven't done so traditionally via waged employment, because women have traditionally worked on the basis of self-employment, doing particular tasks, or short-term casual jobs. Looked at in this perspective, we could ague that we have this little period of aberration, when we had a male breadwinner model. It was a short-lived phenomenon, because we're reverting much more to patterns of employment relationship akin to the way that women have traditionally worked than the way that men have become accustomed to work during the 20th century.

I am not sure that we should mourn the loss of the male breadwinner model. It certainly suited men and it suited the trade unions, which developed to support and reinforce the model. It was one of the key forces that led to unequal pay for women. If you look at the arguments that went on throughout most of the 20th century, really until the 1980s, the male breadwinner model was used to reinforce unequal pay for men and women, because it was

felt that men needed more money than women did, even though they were doing the same job. We should not treat its going as a loss.

Finally, a comment on the issue of risk. In writing the Report, we worked around themes. As a result, I don't think we treated ideas that cut across the vertical themes as well as we might have done: and risk is clearly one of those. The important development in the labour market is the shift in risk within the employment relationship. This shift is not terribly well reflected in the risk/reward trade off. Richard Freeman pointed out that the Report hadn't talked at all about pay. If we had thought in a more crosscutting way about risk, I think that we would have noticed that lack. We do have some treatment of risk in chapter seven, which essentially focuses on human capital and employability. But the shift in risk is the thing that is driving most of the issues that we were observing. The real challenge that confronts us is to create a legal framework, which enables those risks to be fairly shared and yet at the same time enables them to be effectively managed.

Chapter 3. Social Insurance and Future Work

Chair - Reiner Hoffmann

This session is on reforming social insurance and social protection. I think the context is quite clear. The transformation of work has not only had consequences for labour law. It has quite evidently also had consequences for social insurance and social protection. Our first speaker is Jane Lewis from Oxford University, where she is Professor of Social Policy. She will be followed by Simon Deakin. Since 1994 he has directed the Inter-Disciplinary Research Programme on Corporate Governance and Contracting at the Economic and Social Research Council Centre for Business Research at Cambridge University.

Jane Lewis

I should start by stressing that my main interest is in Social Policy rather than Law, Economics or Industrial Relations. I think one of the interesting things is the way in which the main debates in all of these areas of thought, if not practice, are converging. It is intriguing that the Supiot Report calls for a radical rethinking of the principles underlying social provision. The terms here are difficult: social provision, social protection or welfare (which has a rather pejorative connotation in English). It certainly matters what we call these things, but I think Alain Supiot would subscribe to the notion of a rethinking of principles underlying social provision.

Social policy people have been calling for exactly the same thing for the last ten years, looking perhaps at a somewhat wider range of risks than the Supiot Report and especially, perhaps, at the implications of demographic and family change. It's also the case, of course, that social provision must consider the non-able-bodied as well as the able-bodied, whereas the Supiot Report focuses on the able-bodied and those capable of participating in an employment contract. But social policy analysts have argued for some time that the terms of the classic post-war welfare state settlement no longer seem adequate and are probably not sustainable. So my basic conclusions are not so different from those of the Supiot Report. I arrive at them somewhat differently and I would put rather more emphasis, as you might

expect, given the wider remit of social policy, on the difficulties of rethinking the principles underlying social provision.

I want to come to those underlying principles, but, first, I'd like to say something briefly about the relationship between social insurance and the labour contract and, secondly, something about the changing role of the State, which has been somewhat underestimated so far. Social insurance obviously comes into the Supiot Report, because social protection and the labour market have been intimately connected, particularly in the last hundred years. I wasn't going to say any more about that until I heard Richard Freeman describe the shift in the welfare state from a concern with the workless in the direction of benefits tied to work. This is not a characterisation that I recognise in terms of the history of welfare states in the last hundred years, in Europe anyway. Certainly, if you go back to the Poor Law systems, you could argue that they were concerned with those outside the labour market. They were deterrent systems based on need. The whole essence of modern welfare states in the European context has been the move towards some form of income maintenance system. So the relationship between the labour market and social protection of all kinds has been the central concern. In fact, modern welfare states in the last hundred years have been about commodification and decommodification: not just the one or just the other, but both. The relationship between the two and labour market participation has been a key assumption, at least for male workers. The whole debate about social provision in Europe in the last century has been about the variety of conditions that have to be met before permission is given to exit the labour market, with social insurance serving as the core mechanism for broadly defined welfare delivery. It was a popular mechanism and proved remarkably long-lasting in large measure because it is, relatively speaking, self-policing. The worker pays so much in and gets so much out. It is rather crude, but there's a right to draw based on the contributory principle, so that the work/welfare relationship doesn't have to be subjected to the difficult and painful investigation that is demanded by, say, means testing, which is the major alternative mechanism.

Even the US welfare state, if we can call it that, has a major insurance component. In fact, you can make a very good argument that, insofar as the US has a welfare state, it's a social insurance-based one. Social security provision for elderly people proved remarkably resilient against political threat in the 1980s and 1990s. It's the able-bodied person of working age who doesn't have cover in the US in the same way as in the European system. But, because social insurance works via the labour market, profound changes there put a large question mark over the future of social insurance cover.

I would also point out that, while in the European context social insurance was the core mechanism, it certainly wasn't the only way of delivering welfare provision. In the UK, of course, we know that means-tested social assistance has become the core mechanism for delivering social provision. That would be true in a country like Australia as well, but the way in which the means test works in Australia is so different, being more akin to a wealth test, that in some aspects at least Australian provision resembles typical Continental European social insurance systems. The point here is that, historically, there have been a variety of mechanisms for delivering welfare and a variety of choices. When the Supiot Report gets exercised about the effects of change on social insurance, we need to remember that the social insurance model has in fact only been the core system for a relatively small number of countries, if you look beyond Europe.

A second point to note is that, because social insurance is tied to the labour market, it has never covered all workers. After all, the standard employment contract talked about by the Supiot Report was mainly for the male worker. As social insurance developed in different countries, it provided benefits for dependants who were usually female. Anyone with a marginal relationship to the labour market, whether because of age, ethnicity, sex, or disability, usually wound up drawing what feminist researchers as early as the 1970s referred to as second class benefits: *i.e.* means-tested social assistance benefits. Flexible work (or casual work as it would have been called at the beginning of the 20th century) has always been taken up by groups marginal to the labour market, which will often have had to resort to means-tested social assistance. I only make this point because solutions to the kind of social protection problem flagged by the Supiot Report have long been looked for by those whose major concern has been with those groups who are marginal to the labour market. We can learn something from these ideas that have long been put forward.

Post-war welfare states were certainly constructed on the twin assumptions of full-time male employment and stable families, so it's no wonder that the post-war welfare model is in a bit of a mess. That post-war settlement was in fact a double one. It was a settlement between labour and capital; it was also a settlement between men and women. This has been referred to, I think improperly, as the Gender Contract. But the notion that there was some implicit settlement between men and women is a fundamental one that has received relatively little recognition. The welfare system assumed that families would consist of a man, whose responsibility consisted primarily of earning, and a woman, whose responsibility would consist primarily of caring, unpaid work for elderly people, the young and dependants of all

kinds. Now, of course, post-war social trends in most Western countries have seriously eroded this male breadwinner family model.

The major trends have been the rapid pace of family change, resulting (in northern and western European countries) in a large increase in the proportion of lone mother families; the large-scale entry of women into the labour market; and the lesser, but nevertheless significant, decline in men's labour market participation. It seems broadly to be the case that we are moving towards a more individualised adult worker model, where men and women in the labour market are responsible for themselves. So, if that's the case, why on earth not generalise the model of social insurance? If everyone is in the labour market, what's the problem? Why is there a problem of social insurance? I think that basic question still has to be asked and I'm not wholly convinced that we yet need to think about social insurance in terms of straightforward dismantling.

Of course, when work becomes flexible on any one of a large number of possible dimensions, it is hard to fit all employment into a social insurance model. Again, it is interesting that much of the research over the last quarter of a century on these sorts of issues has not started from the angle of social insurance and standard labour contracts, but from thinking about making provision for this unpaid care work, including voluntary work. For this country the question was raised by Anna Coote. What would happen if we made the answer to the question of how to provide for our children the organising principle of our welfare systems? It's an interesting question and a completely different sort of question from the one that has usually informed social policy debates. It raises the issue of new mechanisms. We need new mechanisms and we also need to talk much more carefully about this issue of the lifetime distribution of income. Those are the major challenges we face.

Now let me say something about the issue of how far we've already seen change. I think this is very important, perhaps especially in relation to the Continental European countries which are often assumed to be rigid, sclerotic and all the rest. There is this remarkably false picture of changes in social provision in many countries. Alain Supiot suggested that social citizenship is a more appropriate concept to employ in future than social protection (which is, of course, the French term). I have to say in the UK he's pushing at an all too wide open door. Throughout the 1980s successive Conservative governments found the idea of social protection completely unacceptable, because it sounded like state paternalism of one kind or another. However, those governments also rejected the idea of social citizenship, so we were between a rock and a hard place here. In fact, the New Right has argued very strongly that there can be no such thing as a social right. The argument goes

that social rights, associated with social citizenship, must be fiscally conditioned. Therefore, you can't exercise them. Necessarily, therefore, they aren't rights, so what is the point of talking about them. The extent to which Conservative governments in this country in the 1980s dismantled our social insurance system, especially in the area of pensions, was very striking.

Britain has largely solved its pensions problem, because we have very little by way of state pensions left. This is an issue for the future that we have to address from the opposite direction from most countries. People in this country used to believe that there was a right to pensions and that social insurance rights existed, but it proved quite easy to dismantle those rights. In fact, during the 1990s in many European countries, not just in Britain, the talk has been about the fact that rights entail responsibilities and about how to enforce responsibilities on citizens. Ironically, of course, such enforcement requires something along the lines of a new paternalism. The State needs to do a lot to make sure that people do more than the State. Historically this was also the case with the enforcement of laissez faire in the 19th century. Laissez faire doesn't mean to say the State does nothing; it has to do an awful lot to ensure laissez faire.

The role of the State in social provision has changed greatly, but it's not necessarily in full retreat. Certainly in the 1980s and 1990s, particularly in Europe, this amounted to very major restructuring. Many would say that the major reason for this has to do with globalisation. I tend to be a bit of a globalisation sceptic. I would define globalisation very broadly as the international movements of goods, capital and to a large extent professional labour. In my view, the precise nature of the relationship between globalisation and the fate of social programmes is highly debatable. In particular, of course, the issues are whether there is more labour insecurity and flexibility as a result of globalisation and whether cuts in social costs are necessary to achieve competitiveness.

The Supiot Report has documented the extent of labour market insecurity and flexibility. On the social programme side, there is a lot of evidence (not cited in the Supiot Report). The comparative studies that we have so far discovered retrenchment and lack of expansion. This has been interpreted as a curtailment of social entitlements, but there is very little evidence of the widely predicted "race to the bottom". Even in the UK, which is often classed alongside the US and New Zealand as an example of ideological change in this area, national data have shown deep cuts in only a very few public expenditure programmes. I suppose the main cut would be in social housing. With other programmes, though, expenditure rose significantly through the 1980s and 1990s.

This is an important point, but it doesn't mean that that there has been no change in what the State is doing. On the contrary, in terms of service provision there have been huge changes within welfare states. For example, contracted out services have used independent providers, the voluntary sector and market providers, but in very different ways in different countries, depending on the motivation behind the policy change. In the UK, where the conviction was that market principles would deliver more choice, more efficiency and more effectiveness and where public duty and service were all too often denigrated, marketisation has tended to result in worse terms and conditions for workers. This has been the case, whether we're talking about Next Steps Agencies and the Civil Service or about the home care provider at the front line of the welfare state. However, this has not been the case in a country like Norway, for instance, where market principles have also been introduced into public services on a large scale.

Yet more fundamental, I think, is the way in which policy makers have changed their whole view of social provision. The neo-liberal Washington consensus prescriptions here involved private rather than public provision, allocation by markets rather than on the basis of need, targeting rather universal provision, charging rather than tax-based finance and decentralisation rather than central planning. What you would predict from this would be major cuts. In fact, we have not actually seen that, but we have seen a major effect I think of these sorts of ideas on the assumptions behind the restructuring process. We see quite a big commitment to the human capital parts of social provision, to education and health, but a much tougher approach to cash benefits.

The restructuring that we have seen in the Continental welfare states has been impressive. In Jonah Levy's terms, vice has been turned into virtue. France has managed to turn its family allowance system into an anti-poverty measure by targeting, something I have mixed feelings about, but which is seen as positive in most quarters. Italy has reformed its manifestly unfair pension system. The Netherlands, as we all know, has focused on employment creation and labour market reform. In the UK, we've got the emergence of an altogether new kind of welfare state, which I think is very interesting and promising. We've seen a strong commitment to basic welfare services, like education and health, alongside an acceptance of a low wage flexible labour market that was created by successive Conservative governments, reinforced both by work subsidies, first, via the benefit system and, now, via the tax system and by labour market activation policy via a series of New Deals.

So a lot has happened and is happening. I see this change as real and continuing, so I'm in some ways more optimistic, perhaps, than the Supiot Report. The danger for me is

that these changes are not radical enough. Most of the initiatives and effort have been on the employment side of the equation, affecting people who are in employment contracts of one kind or another. To take the UK case, on the work side you've got a commitment to work subsidies, to do something about low pay via the benefit and now the tax system, the New Deal labour market activation programmes based on the Swedish model and much more. But what about the question of rethinking work? What about the redistribution of income over the full life course? This is a real and urgent issue, because we are in danger of assuming that the male breadwinner model has already been replaced by an adult worker model. This fails to recognise the reality, which is that in most countries we are at best at the stage of having what might be called a one and a half earner model. There is a large amount of part-time work, generally done by women in Western European economies, a large proportion of them working below the social insurance thresholds. This is a highly significant factor. A quarter of women in the UK work part-time. Twenty per cent of German women work under the social insurance threshold. With the Dutch miracle example, 80 per cent of women work part time and 33 per cent work less than 20 hours a week. Indeed that Dutch model of labour market flexibility has explicitly aimed to create a one and a half breadwinner model. There are no prizes for guessing that it is usually women who get the half.

So we need to think more about redefining work and then about programmes that can take on board the issue of the disadvantages linked to necessary care work and the need to do something about redistributing income over the life course. If we do not, we are in trouble and will be storing up huge amounts of gender inequality for the future.

It is clear that we are moving in the direction of individuals becoming more self-provisioning, with defined contributions for pension contributions and individual accounts of one kind or another. This development presumes that all adults are active in the labour market and that is a big assumption. I personally don't think that the adult worker model is necessarily a bad thing. In some circles this is rather controversial, but a hundred years ago in this country the Labour Party's view was that wages were the best form of welfare. The early Labour Party in this country didn't give a hoot about social insurance. That is fine, but it does pose the question of the terms on which we are going to construct an adult worker model.

I think that three important things have to happen. The first is that we have to compensate, to value and to share more equally the unpaid care work that all societies need. Even if birth rates are falling, the demographics tell us that there are going to be many more frail elderly people requiring care in the future. Second, we have to promote transitions

between different types of paid and unpaid work over the life course. And, third, we have to provide life chance guarantees, so that those entering low paid flexible jobs do have a chance to leave them, but those who stay in them (and there will always be people who stay in those jobs) are properly compensated. In other words, we need some sort of "in work" benefits.

We have got examples of routes to follow in all three respects in different European countries. I always hesitate to raise the Scandinavian model, because people in this country tend to wince and question whether it is generalisable. Nevertheless, Scandinavia provides us with an adult worker model, just as developed as in the United States. It assumes that all citizens will be in the labour market. The difference is that in the US care work is entirely unsupported, while in the Scandinavian countries it is supported in a variety of ways: by services and, indeed, by generous leave entitlements with wage replacement. We know exactly what we have to do to make parental leave work in a way that is not prejudicial to women. To make it work as a gender equality measure, we have to compensate it highly, we have to give a right to return to work and we have to encourage men to take it too. In fact, we have to do a bit more than encourage men to take it. We have to actually do something about sharing all forms of work in society, so not just compensating unpaid work. We need to address the issue of paid working hours and the issue of how to get men to do more unpaid work. In a 1991 report, the OECD promoted the idea of combining work and care for men and women and has repeated the idea since. When it had the presidency of the European Union two years ago, the Netherlands government accepted the idea of what it called a "combination scenario". If we look to the Scandinavian countries, for example, we've got the example of the Daddy Month.

While, we do need to think about these new sorts of forms, I don't think we need to throw out social insurance altogether. I don't see why there shouldn't be a place for social insurance, but maybe we do have to think about other cash benefit forms. For example, I cannot see how governments who increasingly emphasise responsibilities to participate in some way in the labour market are going to buy into the idea of basic income. On the other hand, participation income of some kind, which recognises voluntary and unpaid care work, may warrant consideration. This is close to Boissonnat's activity contracts. The problem here, as Tony Atkinson demonstrated some years ago, is that it's likely to cost an awful lot to achieve anything worthwhile. Certainly labour market activation policies are part of the picture, making it easier to enter the labour market. So is care leave. However, we do need to pay much more attention to the issue of distribution over the life course. For instance, pension credits for periods of care are in many countries woefully inadequate. The second

state pension idea now being proposed for the UK would give pension credits for care at a lower level than even the basic pension. This is a big problem and it's a problem to know what to do about it.

With the issue of enabling people to move on from poorly paid jobs, we come to the buzzwords of education and lifelong learning. We should look seriously at proposals like Claus Offa's lifetime "leisure accounts", the notion drawn from social insurance of citizens contributing into a leisure account from which they can draw to finance education, training, or care-giving; or at Bruce Ackerman's idea of giving every new-born child a substantial endowment conditional on it being spent on training and education rather than on a motorbike. But we must not here lose sight of the fact that many people will stay in low paid, flexible jobs, because if we're going for an adult worker model, a lot of the jobs that are created are going to be low paid and flexible. For this reason, the adequacy of work benefits will remain one of the major issues in many countries.

In terms of the principles underlying all this restructuring, social policies are about social investment, provision and protection. They are also about enabling people to make choices. They are about provision for the able-bodied, certainly. But social policy reconstruction must also be about those who cannot work, which is a crucial and much more tricky area. I am convinced that we need new principles. I am not sure, though, that we are ready to move as far as the Supiot call for the European Commission to become the guarantor of fundamental social rights for all European citizens.

Simon Deakin

I should like to offer a lawyer's eye view of the issues that we are discussing. Are we seeing fundamental changes that necessitate a reorganisation of labour market institutions? If so, what does that really imply?

The methodology I use in my own research is very similar to that which I take to be Alain Supiot's. We both believe that the labour market rests on conventions, or presupposed practices. It's not a free-floating entity and it cannot be understood without reference both to social and judicial norms and processes. This implies that the State isn't something completely separate from the labour market, imposing rules on it. We have a situated state in the sense that the law is situated in labour market processes and results from them. So, if

we're talking about some fundamental series of changes in the economy or in technology, which apparently now require fundamental reform of our welfare state institutions, these are themselves a product to a degree of legal change.

The law itself has an evolutionary character. It's not static. Nor is it something that can be changed at will by legislators. I was very struck by David Marsden's article in the Winter 1999 issue of the CEP magazine *CentrePiece*, which compares the institution of the contract of employment with the institution of limited liability. He argues that they're both in a sense fundamental institutions for the development of capitalism. In both cases, we can find statutory forms for the contract of employment and for limited liability. But, of course, these concepts were not invented by a statutory drafter at some point in the middle of the 19th century, or later. They were the product of an evolutionary process involving litigation, private contractual arrangements and attempts by courts and by legislators to articulate particular principles. So what's going on here is an evolutionary search for the articulation of those conventions on which markets rest. This implies a twofold perspective - we need to understand the internal language or discourse of law, the way in which concepts evolve, which may sound rather dry and the kind of thing that academic lawyers do. But we also need to have a social science perspective on law, which, as Alain Supiot said, is more sophisticated than simply seeing it as an instrument at our disposal for changing society.

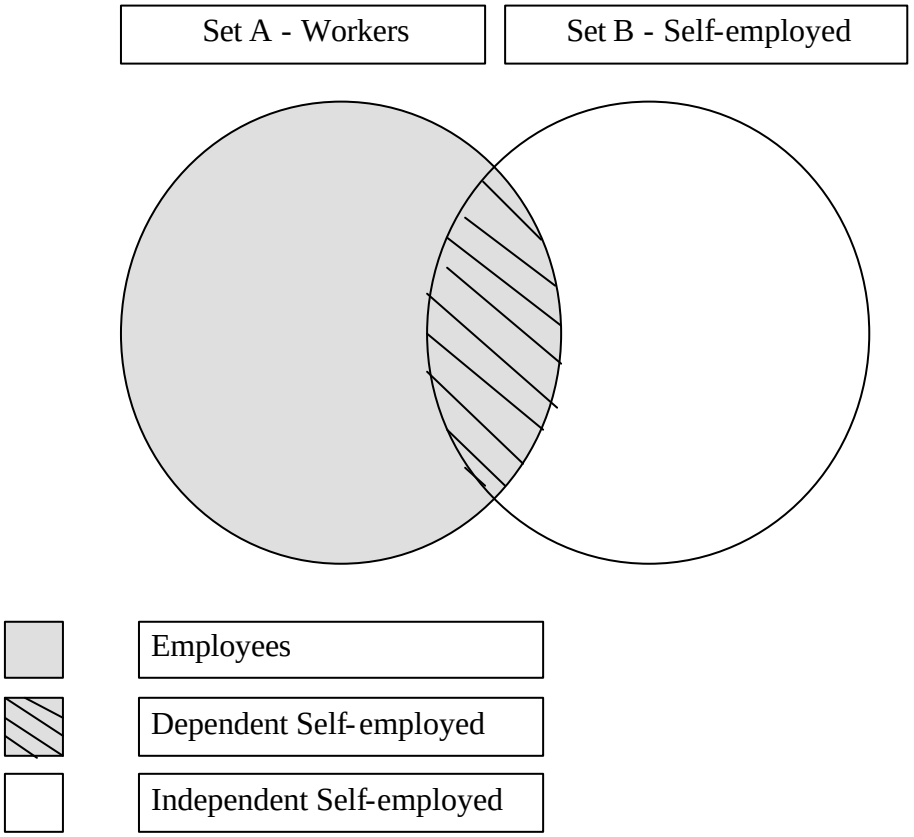
With that in mind, let's think about the contract of employment. We think of the employment relationship as fundamental to the labour market. Statisticians, economists and social scientists use concepts like employment and self-employment every day in their work. They may assume that we've had the contract of employment or the employment relationship for a very long time and that, in some sense, the welfare state laid a burden on top of them, a burden of regulation that limits the capacity of the parties to contract for whatever they want. I've argued elsewhere that this is a misleading way of thinking about the contract of employment. It's just the opposite. It is a very recent institutional innovation, which owes its existence to the welfare state and has not been denied by it. What we know today as the contract of employment is an amalgam, something that was built on top of a 19th century restrictive and oppressive view of the employment relationship, the master/servant model. That model was taken and adapted just over a hundred years ago by reformers who wanted to use it to put in place a better set of mechanisms for dealing with risk allocation. That's essentially what the contract of employment does. Today's contract of employment embraces such things as a social insurance system, a pay-as-you-earn income tax system, so-called full employment as it has evolved in the post-war period of vertical integration, so-called

Fordism and employment protection. It is the consequence of what Sidney and Beatrice Webb called the public organisation of the labour market through public law. This labour law began in times very similar to our own, times of what would now be called globalisation, but was then called something else, times of very rapid technological change in the final quarter of the 19th and the first few years of the 20th century. The reformers didn't respond then to the changes they faced by concluding that what little protection existed had to be removed in order to make the market work better. Note that they set about organising the market, not denying it; but organising it with very specific objectives in mind. Such public organisation of the labour market seems to me to be no less legitimate a goal today, although no doubt we would think about it rather differently.

In trying to bring some of these themes a bit more down to earth, it is interesting to explore the distinction between employment and self-employment.

Figure 7 more or less describes where we stand today in employment law terms. We are used to thinking about employees and the self-employed as the two fundamental categories in the labour market and to thinking of them as being mutually exclusive. You are either one thing or the other; you are either an employee or a self-employed person. The diagram illustrates the emergence of a kind of third category in between the two. The two significant sets A and B are not actually employees and self-employed, but something which lawyers call workers in the case of A and the self-employed in the case of B.

Figure 7



The legal notion of the worker includes employees, but also it includes the category I refer to as dependent self-employed. They are the people who are self-employed but don't have any employees or business assets of their own. They are this very significant third group of so-called para-subordinate workers. The solution to their existence in the UK in the case of legislation passed by our present government is the use of a concept that widens the notion of protected worker to cover this particular group. There are various juridical ways in which this has been expressed, but what does the development signify? In my view, it signifies ultimately the end of the employee/self-employed distinction. It is misleading to think of self-employment growing within the population at the expense of the employees. If the notion of employee disappears from our labour market and our labour law, then so will the notion of the self-employed person and concepts as yet unrealised will replace them. At the moment we have rather a halfway house, a hybrid.

If we go back to the 19th century, we don't find the notion of the contract of employment at all. Yes, we find the notions of the independent contractor, the servant, the labourer, possibly even the employee. These were classifications that courts used for workers until the 1870s. The major classification existed in order to determine the reach of the criminal law. Criminal statutes, which put people in prison for breaking their service contracts, only applied to servants and labourers. The courts were keen, at this time, to find that independent contractors were servants and, therefore, subject to criminal jurisdiction. Higher status employees (clerks, merchants, others) were outside the scope of the master and servant laws. For most of our capitalist history, the important distinction has not been between employees and self-employed, but between white collar and blue collar workers, or between managers and others, or some other equivalent distinction which drew the line between those workers subject to legal disciplinary coercion and those who were not.

What you see later in the period from roughly 1875 to 1945 is a threefold distinction: independent contractors, the so-called workman and the employee. Social insurance is important here, because during this period national insurance legislation did not cover by any means all employees. First of all, it didn't cover all higher paid middle-class employees, because it was felt they didn't need to be covered. Parliament and the courts took the view that there was no point providing a state scheme for those already quite well off. Next, at the bottom end of the scale, legislation excluded casual workers, those we now call flexible workers, because of the costs of incorporating them into what was a redistributive financial mechanism. So the issues we face today have been faced before. What happened in the first half of the last century was the gradual extension of the scope of social insurance, bringing more and more people within its scope, until in the end after 1945 (but only then) we had the now familiar distinction between employees and the self-employed.

Social insurance is really just a mechanism for shifting risk about within the population. In this sense, national insurance means literally what it says. The purpose of distinguishing between employees and the self-employed was to give employees security in return for subordination. The employee was protected and risks were dealt with through the enterprise. Labour law is really all about enterprise liability. The enterprise either bears the costs of taxation, social insurance and health and safety responsibilities or it passes them on; or these costs are shared through taxation.

The enterprise, of course, is a highly effective institution for spreading risk throughout society. As Jane Lewis has said, the same is true of the family. One aspect of these distributive mechanisms is that they can produce highly unequal results. There are

winners and losers and that certainly was (and still is) the case with both social insurance and the family. The point about this particular distinction between employees and the self-employed is that there was also an implicit bargain for the self-employed. What they got was independence, autonomy, freedom from control by an employer; but they also got significant fiscal subsidisation. This is, after all, why there are so many fake self-employed workers. There are substantial tax advantages to be gained from self-employment, not just for the worker but even more for the employer. The employer can avoid Schedule E and the organisation of pay-as-you-earn taxation and its equivalents in other systems. If the worker is not an employee, the employer can avoid paying certain classes of national insurance contributions. Partly to stop this kind of tax evasion, fiscal and social insurance law have always used a slightly broader notion of the employee than is used in employment law. Recently, the response of the Inland Revenue to widespread tax avoidance/evasion in the UK construction industry was to force employers to bring apparently self-employed workers into the pay-as-you-earn Schedule E system. They had to start treating them as employees and to deduct tax at source. The Inland Revenue saved millions, even billions, of pounds by this legislative step. So, again, we haven't responded to casualisation and flexibilisation by throwing up our hands and saying there's nothing we can do about it. People have sat down and devised institutional solutions to the problem.

Nevertheless we have to face the question of why social insurance has been in crisis throughout the 1980s? What happened, of course, was that the principle of inter-generational transfers underlying the insurance system was undermined by legislative changes which enabled governments in the 1980s to use the national insurance fund to subsidise tax cuts. The process continues today. Employees in the UK pay very high social security contributions on top of their income tax without asking themselves where the money goes or what they get back. There is a widespread misconception that we pay our social security contributions for the National Health Service. This is completely untrue. The National Health Service is almost 100 per cent paid for out of general taxation. So where does the money go? It doesn't go on unemployment benefit, because after 1980 the link between unemployment benefits and earnings was abolished. It doesn't go on retirement pensions, because again the link between pensions and earnings has been abolished. Neither pensions nor unemployment benefit any longer rise in relation to earnings. Unemployment benefits are not earnings-linked in any way. In fact they are in essence a means-tested benefit for which you have to pay contributions. That doesn't make any sense.

So why does this situation persist? Because it's a fantastic break for the government. All this tax money comes in under the heading of social security contributions, allowing the government to pretend that the tax take is lower than it actually is. What has happened to social insurance should be a matter for public choice analysis. The system began to fail because of the enormous scale of the redistributions involved in it. The fact that the entire working population is supposed to pay into the system and that, in some sense, the entire population of the country benefits from it creates enormous temptations for what institutional economists would call opportunism or strategic action or rent-seeking.

This is the reason why I do not think that we can implement the reform Jane Lewis described of moving to an adult worker model for our social insurance system. Getting to such a model would involve very heavy costs in terms of public choice factors, monitoring, verification and interest group activity. We face the classic dilemma for collective action: if enough people do not want to make the first move in this situation, neither will the politicians, nor the social partners, because they know that they won't receive cooperation from the others.

So social insurance is in danger of failing because, collectively, we fail to see how important it is. We fail to convince people that the benefits of taking part in this system will be worth the costs of entering into such a very complicated, very long-term implicit contract between the generations. However, to assert that globalisation requires us to move away from state support to a system of private provision of pensions is to beg the very question that we should be discussing. That question is: at the end of the day, which of the two is the most cost-effective system?

Richard Freeman has argued that, with the growth of employee stock option plans (ESOPS) and money purchase pension schemes, more employees are now receiving payments based upon their performance. This may be partly true in the case of ESOPS. It plainly isn't true in the case of defined contribution pension schemes in Britain, because pension schemes normally don't hold shares in the companies of the employees on whose behalf they act. In fact, there are laws against it for the obvious reason that having your pension tied to your employer's performance exposes employees to an enormous risk. Incidentally, this is why profit-related pay has never really caught on. You may remember in this country there were tax rebates to encourage profit-related pay schemes in the 1980s, which the last Conservative government got rid of when they realised that they were just a tax giveaway that was achieving nothing real on the ground. The issue has to be whether we can conduct a dispassionate discussion about the pros and cons of particular arrangements

without stigmatising those that happen to be based on public law and organisation on the grounds that they involve the State. For, of course, the State will be involved in whatever arrangements we establish for private pensions or for other financial mechanisms designed to provide income security.

We undoubtedly find ourselves in a situation of rapid change. But, as I have argued, it is change in which institutions play a deciding role and to which they are themselves adapting all the time. As David Marsden wrote in his *CentrePiece* article, perhaps the contract of employment itself, as an institution with its stress on the bargain of security in return for subordination, needs to be changed, if we are to overcome the problems of high unemployment in EU member states.

Maybe that is right, but it is interesting to note that the parallel case is not made for changing limited liability, which is also being seen as a very contingent institution, although there is a debate going on, of course, about stake-holding and mutuality. If you want me to look into my crystal ball, I would say that we are much more likely to see a certain evolutionary process take place than to see well- known and familiar institutions being totally undermined as a consequence of economic and technological change. We are, therefore, likely to see transformation of these familiar concepts over time, rather than a big bang in which the welfare state is replaced by some form of organisation based on the market principle. As Alain Supiot said, at the end of the day the welfare state and the family are the foundations of the labour market.

Chapter 4. Europe's Social Dialogue

David Coats

I should like to make some observations in particular about the situation in the UK in relation to the traditional contract of employment. The most striking feature of the UK is the extent to which the traditional employment contract has continued to be the bedrock of the labour market. It is not under such pressure or threat that we are faced with the need to rethink the whole social security system from first principles. There have been changes in job tenure and growing feelings of job insecurity, but these have reflected the pace of organisational change in the economy rather than the end of traditional employment patterns.

It is also the case that temporary working is much less widespread in the UK than the EU average. This EU average is raised in any case by high temporary work levels in countries like Spain.

For the UK, I would stress the degree of persistence in the labour market. So we still need the basic social security system, which shares risks across all those in employment, though I accept that it was originally established on the assumptions of stable family units and of the male breadwinner as the principle source of family finance. We certainly need to adapt the system to the changes that are taking place, particularly the large increase in the number of women in the work force, many of them working part time. The issue is how to enable those with relatively low earnings and, therefore, relatively low contributions to have access to benefits. But this is not the same thing as wanting to change the entire system. The trade unions in this country believe that work should continue to be the basic underpinning of the social security system.

The problem is, therefore, one of adapting the existing system. In the UK some limited steps have been taken in this direction in the last couple of years. The introduction of a "zero rate" band for contributions means that a wider range of workers has access to the benefits of the system, without being required to pay contributions. This zero band is set between the lower limit for national insurance contributions and the level at which people start paying income tax. If the limits of this band are held constant in cash terms, inflation and fiscal drag will steadily bring more workers within its scope. Two further reforms are also worthy of mention. The earnings limit for the maternity allowance has been reduced.

And the new State second pension scheme gives contribution credits to carers and the disabled, who have had some contact with the labour market but who are no longer working. They can be credited as if they were earning and paying contributions on earnings of £9,500 a year. These changes are a move in the direction of the recommendations of the Supiot Report, by valuing these activities and providing access to entitlements even when an individual is not in standard employment.

Simon Deakin is right in saying that there is now a large and growing area of overlap between employment and self-employment. Here there is a difference between the UK with its common law tradition and most of the rest of Europe, where civil law systems embody the notion in their labour codes of a benchmark standard employment contract, carrying rights and responsibilities. As has been said, under European civil law there is a sense that workers to an extent own their jobs. This is certainly not the case in the UK.

In some ways our common law approach has proved flexible in being able to adjust itself to many different patterns of employment, with any kinds of conditions attached and any number of hours worked. But the common law has also shown itself incapable of distinguishing with any certainty between employment, self-employment and dependent self-employment. One solution has been increasingly to treat the small but growing number of dependent self-employed workers as if they were employees. Thus, in the UK, minimum wage and working time regulations apply not to "employees" but to all "workers", a much wider category. (It has to be said that the government's line here has not been consistent, since many other rights do not apply to all workers.)

One response to this issue has been to say that it does not matter. If all the pressures on employers, for example from the Inland Revenue in the case of the construction industry, are to treat these dependent self-employed as if they were employees, then over time they will in effect be covered by classic employment contracts.

Perhaps the main problem in the UK labour market is not the threat to the standard contract of employment, but the increasing *inflexibility* of working time. Average working hours for those in full-time employment has increased steadily over the last 15 years. At one end of the scale, there is a significant group, principally male, now working excessive hours, 60 hours a week or more. At the other end there are growing numbers of people, usually women, working short hours in small part-time jobs. In this respect, the opportunities available in the British labour market are certainly not reflecting the working time preferences of those involved.

So we have to move beyond the standard debate about reducing the length of the working week for those in full-time employment, on the one hand, and extending equality of statutory and contractual rights to part-time workers, particularly women, on the other. Here we should take seriously Reiner Hoffmann's proposals about managing working time over the whole working life cycle. It may suit someone to work long hours in their 20s, but then to work shorter hours in their 30s when they have children, or to take a career break in their 40s, or to retrain. In the UK we have barely scratched the surface of this debate, in which the gender issue is critical. In conceptual terms, at least, it had advanced further in other EU countries. But, if the notion of life-long learning is to have any real meaning, employers must provide space and time for it. The part to be played by employers and the implications for the social security system have not yet been properly considered.

The real challenge for the future will be to match people's working time preferences with the opportunities available and to devise a social security system that enables people to make those choices through their working lives.

Chair - Peter Auer

David Coats has bravely challenged some of the assumptions underlying our discussions about changes in the employment and social security systems. He has reminded us that they still retain a substantial element of stability. This is fundamental to our debate. Before you advocate changes in the whole of the social security system, you need to examine whether the existing system and the reforms already underway already have the capacity to extend the required coverage of social security to the, perhaps, marginal groups involved in these changing employment patterns.

Renate Hornung-Draus

Let me start with the chairman's last thought. I do not believe at all that the problems we are looking at can be solved simply by integrating the new forms of employment that have emerged into the existing social security system. Small changes will not be enough. The existing system is already under too much pressure. We have to remind ourselves that the

basic question is how can reform of the social security system be achieved in such a way that it contributes to the creation of more employment.

I agree with David Coats that the traditional employment model is still very much with us and that we do not have to think in terms of abolishing it entirely. I am not pretending that the patterns of Silicon Valley and Hollywood have become the norm. But these new patterns are a growing element of our labour market and the challenge is to adapt the social security system to this much greater diversity. The existing arrangements need to be reformed on many fronts.

The first point is that there is growing tension between social insurance (unemployment benefit, sick pay, old age pensions and the like), which is usually financed by contributions, and social assistance, which is there to combat poverty directly and which is generally tax financed. It is a fact that, with globalisation and the single currency, the level of contribution-based social security has produced competition between countries. Where companies have to finance contributions that are linked to employment and salary levels, higher non-wage labour costs are involved than in tax-financed systems, where all revenues contribute to the financing of social security. This is a threat to the traditional system of social insurance.

In addition, new forms of employment contracts have eroded the financial base of the system, as many of them are exempted from having to make financial contributions. They also exclude the workers involved from benefits and so create insecurity.

For pensions and sickness benefits, by far the biggest problem in most of Europe arises from demographic changes. These must not be forgotten or minimised. The whole system is also being challenged by major changes in lifestyles, especially the emergence of women as independent breadwinners, and much more complex family structures. The classical nuclear family remains an important model, but it is no longer the dominant one. We see the growth of single-parent families and families falling apart and regrouping. All these developments represent a challenge to the traditional social security system.

That system needs to adjust to the greater diversity in the labour market and to accommodate growing levels of discontinuous and multiple employment. In particular, if we want to promote the new forms of employment without at the same time creating new insecurity, we have to break the strict link between social security and the employment relationship. This is one of the themes of the Supiot Report and, to some extent, it is an idea that is already being developed in certain European countries. Here the idea of social

drawing rights is interesting. The critical question is how to develop the financing of these rights in practical terms.

In addition, a necessary reform is to ensure that the rights that have traditionally been acquired through the contract of employment, for example covering overtime working or supplementary pension arrangements, should be made transferable and not lost between employments. There is an interesting debate going on in Germany now about introducing "lifetime working accounts" to accompany the employee into new employment.

A second aspect of this is that certain social rights, for example parental leave and paid leave to look after a sick relative, should also be separated from the employment relationship. Society as a whole has an interest in financing this kind of activity and there is no reason why the individual employer should be required to bear the cost.

How is a reformed system to be financed? If the European economy is not to lose competitiveness, non-wage labour costs must be held down. In policy terms, this means that there will have to be more reliance on tax-based finance and less on contribution financing, which in any case does not work well in the multi- and flexible employment model. But let us be clear. The shift to tax-based financing will in turn produce political pressure for lower levels of benefits and a growing privatisation of social risk. It seems that we are, anyway, moving in this direction in all or most European countries. The increasing individualisation of risk will, in Europe as it has already done in the US, lead to the increased blurring of the line between capital and labour, which Richard Freeman has talked about.

This raises the question of the generational conflict inherent in the reform process. Inevitably, the currently active generation has to bear the cost of the old system, from which the older generation is now benefiting. But the same currently active generation will have also to finance its own future security on a different and private basis. The problem will be to find a balance between these conflicting interests.

However, we should not ignore the possibility of collective solutions to these problems. The Danish example is instructive. It is true that Denmark has the advantage of being a small and homogeneous country; but it does combine a highly flexible labour market, with very few restrictions on employers and very little protection for the employee against dismissal, with a generous collective social security system and a high employment rate. Such a model might be more difficult to organise in a larger and more complex society, but it is an interesting response to the kind of challenges that we are discussing.

I should like to end with a note on the difficulty of reconciling a move towards greater individual rights in this area and the existing structure of collective rights. For example, the

EU Draft Directives on combating employment discrimination, especially in the professional field, are transposing US and UK ideas onto the Continental model in a way that may in the long run undermine existing collective structures. This is because they would make it much easier for decisions by employers and works councils to be challenged at any point and on a stronger basis that in the past.

So here we need to explore further the question of how these increased rights for individuals go together with the maintenance of the collective nature of the social security system, because there is here an inherent conflict of principle involved.

Chair

The Danish case is indeed interesting. But, if you go down that route, you have to embrace both very active labour market policies, accepting high replacement rates in the work place, and high rates of taxation.

Hedva Sarfati

I think that there are a number of changes in the labour market that have had a major impact on social protection. These include high and persistent unemployment rates and the associated social exclusion; a significant increase in the participation rate for women in the labour market; and the diversification in forms of employment, which have raised issues about how to guarantee the capacity of wage earners to contribute and have access to social insurance.

We now have high proportions of women as lone parents or heads of households in low-paid, low-skilled and precarious jobs, if not unemployed, who do not have the capacity to make social insurance contributions and hence are not adequately covered by existing social protection schemes. This has direct implications for future generations, because children who grow up in poor, and particularly in "workless" households typically have high dropout rates from school, bad records in relation to entering or then staying in employment and a high propensity to drug addiction and criminality.

Arguably, while many of those who work part-time enjoy a stable employment relationship, a significant proportion among them (about 10 per cent on average in Europe) work short hours with low earnings and those in other kind of atypical jobs may have discontinuous working lives, which means that they are also unable to contribute to social security and are excluded from its benefits coverage.

At the same time, working lives are getting shorter at both ends. Over the past two decades, young people have been entering employment for the first time later and later in their lives. This trend seems to have been somewhat stemmed during the recent rebound in economic activity, but that may not last. Economic growth combined with active labour market measures was what helped the Danish model to succeed, as well as the other Nordic countries and The Netherlands. A number of EU countries also introduced a variety of youth job creation schemes to reverse this trend of late entry into the job market. Without doubt, it is economic growth that enables young people with good educational background to enter the labour market. However, with the spread of technology and the knowledge economy, this may be at the expense of older workers who may be less better educated and qualified.

So, at the other end of the spectrum, there are increasing problems of ageing and dependency. Today people become economically "old" at a younger and younger age, as globalisation and competition in the knowledge economy put a premium on innovation and high productivity. This has the effect of excluding many people from the labour market who could be maintained in employment. The policy issue is how to keep them in jobs, or to get them back into employment, because with the declining activity rate of the population dependency rates may threaten the viability of the social protection systems. There is, therefore, a need to change existing attitudes, lifestyles and forms of social and economic organisation, by developing bridges between paid and unpaid activities and mobility between full-time and part-time jobs, as well as by encouraging and recognising community work or caring for people, which responds to needs that cannot be met because of constraints on public spending.

Often the current debate on the reform of social protection fails to get to grips with the fact that in this process there are insiders and outsiders. The insiders - who have full-time and long-term jobs to which social protection rights are attached - are those who stand to lose from the reform process and they are very vocal. They are unlikely to support or accept a solidaristic approach to reform. Frequently, therefore, the social partners tend to oppose the reform process.

As a result, no fewer than four European governments have come to grief over the reform process in the recent past: in Germany, France, Italy and Austria. Their successors in office also found it difficult to cope with the issues involved, because the objectives of the reforms were not clearly understood and no national consensus on the subject existed. Indeed, public opinion has in general not been made adequately aware of the implications of the reforms. In France, for example, no less than three official reports on the impact of the long-awaited pension reform were published arriving at diametrically opposed conclusions. Moreover, in many cases, governments do not publicise the criteria by which the effectiveness of the reform process might be judged.

At a recent meeting on social policy at Sterling University, a reputable academic was astounded by the fact that he was quite unable to discover anywhere any statement of the objectives for the current reform programme in the UK. He had read all the Green Papers and White Papers, but no such statement existed. Without one, how can one envisage the process of social dialogue and building a consensus?

This process is, of course, not easy in any case. Smaller countries, like Denmark and The Netherlands, Finland and Norway, have perhaps managed it better, because they are organised to do so and have articulate representational systems, where people are ready to try to find compromises. But it is encouraging to see that Ireland was able to achieve consensus at national level about the reforms, despite past highly adversarial labour relations. And, interestingly, the Irish unions have managed to bring to the bargaining table representatives of the "outsiders", the excluded and marginalised groups in the labour market.

In Spain, where there is a large "underground" economy and rigid labour market regulation on severance pay and on hiring and firing, social dialogue made it possible to adapt the legislation and to create jobs on a massive scale, although mostly these were fixed-term jobs. Arguably, while unemployment levels have been dramatically reduced over the past four years, Spain still has the highest unemployment rate in the EU. This social dialogue, which came under strain in the last years of the Socialist government, has been maintained and reinforced under the Conservative government. In Italy, the pension reforms of 1994 brought down the government. But, when extensive consultations were introduced by the Centre-Left government, they were finally endorsed. Moreover, the trade union movement found a way to give a voice to some atypical workers. The three trade union confederations, for example, managed to establish units for the self-employed and temporary agency workers to ensure their collective bargaining rights at both the national and local level, which is important in Italy. The first collective agreement signed in 1ate 1997 covered

temporary workers. This was of particular significance because it happened soon after private employment agencies were legalised.

These issues are close to the concerns raised by the Supiot Report, among which I would underline the following.

First, optimum outcomes can be achieved in the field of social rights, provided there exists an articulate social representation which has the capacity to enter into social dialogue and collective bargaining. But this is not achieved overnight. So we have to look carefully at the institutional underpinnings, particularly in countries where there are weak or declining trade unions, or where the employers' organisations are not properly representative of the economy as such. This aspect is particularly important in the context of transition to the service economy, one of the major shifts that we are experiencing today - and where the social partners are less present than in manufacturing industry.

Second, Supiot highlighted the risk of "contractualisation", in which collective agreements replace employment or social protection laws. This is likely to be of particular concern in respect of reform of social protection and of pensions, because these issues will be central to the future of collective bargaining and social dialogue. The risk stems from the fact that the agreements will reflect the balance of power at any given moment at a particular level, be it national, provincial, local or at the workplace. Collective bargaining may thus undermine the basic guarantees provided by the law. Thus, for example, the French 35-hour week legislation, which was vehemently opposed by the central employers' organisation, led in fact to an unprecedented degree of flexibility in the workplace, particularly in the organisation of production and work scheduling. Weekly working time can now vary from zero to 48 hours, far beyond what is permissible in law. So there is a danger there that collective bargaining may bypass the power of the State to guarantee the implementation of legislation.

In the EU context, the Social Chapter of the Treaty of Maastricht and the Treaty of Amsterdam have given the social partners unprecedented rights and powers that could enable them to bypass national legislation, though the scope offered here has not yet been exploited to any significant degree.

I should like to end by putting some deliberately provocative questions about pensions reform. Complex parameters are involved and the volatility of stock markets makes it difficult to define an adequate reform policy. The questions, therefore, relate to the objectives of reform in this area.

1. Is reform intended to provide a decent standard of living for pensioners, or is its purpose to increase the level of savings to supply capital for domestic and overseas economies? From institutions like the World Bank, the IMF and the OECD say, you might infer that the main purpose of the reforms is to bolster the capital markets.
2. Should the purpose of the reforms be to obtain better returns on public and private pension funds? What proportion of GDP is it appropriate to distribute as income to households or as a return on capital? And who makes these decisions?
3. What guarantees should be put in place (and by whom) as a protection against the consequences of market failures and performance shortfalls? These are critical questions, because the decisions we take today will be a commitment for future generations.
4. Should trade unions play an active role in managing pension funds? If so, what steps are required to prevent political motivations jeopardising the financial interests of pensioners? For example, without questioning the point of a policy of pension funds only investing in "ethical" companies, would this tally with the need to provide future pensioners, who have put their money into a fund, with the best possible future return?

These questions have guided the comparative study that I am directing for the Geneva-based *International Social Security Association* on the *interactions between labour market shifts and social protection reforms in the OECD region*, the results of which will be published in early 2002**.**

Alain Supiot

Since we are discussing these matters at the London School of Economics, I want to stress the point that the traditional basis of Continental law has been the basic distinction between private and public. Lawyers on the Continent are still taught this distinction and we still think in this way.

Let us look at what has happened to this distinction at the Community level, for Europe is a real research laboratory for the more advanced manifestations of the globalisation process, born of the opening of national boundaries. We see that the European Court of Justice is in the process of constructing a new basic distinction: a dogmatic opposition between the “economic” sphere and the “social” sphere. It is substituting this for the former distinction between private and public.

The traditional judicial construction was that the public sphere was the guarantor of the general interest, while the private sphere protected the interests of the individual. Now, at the international level, we are seeing a reversal of this order and a move to a situation where the public order is subordinated to the laws concerning competition, which are part of the private order. The public interest now appears legally as local concept, in contrast to international business law that concerns itself with conflicts between private interests.

This is the reason why the Court of Justice has been constrained to make this distinction between economic and social issues. But here, in considering the question of whether a social security fund should be treated as an enterprise or not, it had to conclude that, in order for the market to function properly, it was necessary to accept that something has to escape its rules. This "something" is what I call the social sphere.

Of course, from the point of view of a social scientist, all this has no meaning at all. In real life there is nothing that corresponds to this view of a split between economics and society, except perhaps computers in stock exchanges. (For example, to question whether a labour relationship is an economic or a social one is senseless.) But these two categories were dogmatically invented and we can see that in the meanings attached to old words like "law" and "contract" profound changes have taken place.

Let me comment now on the questions that have been raised about contractualisation. For about the last 15 years we have been saying again and again that the law of contract only concerns itself with procedures. But in the classic liberal construction of the law, the State was the guarantor of public power, which concerned itself with all qualitative issues. This construction allowed the development of a totally abstract notion of a contract. You could remove from it the person involved, the thing being contracted, the location of the contract. But this idea of the law of contract was only possible because of the role of the State, which took responsibility for all qualitative questions; and, in particular, of what we call in Romano-Canonic law *l'état des personnes* (*i.e.* the legal foundation of the identity of a human being).

From the moment that the State began to disengage itself from these questions - taking the line that life was now too complicated, that it did not have the cognitive capacity to organise society, that it should confine itself to procedures and the paper work - concrete qualitative questions came back into contract law and the contract could no longer be thought of as a totally abstract concept.

That led to a break. We went on using the same term - contract of employment - but the nature of the State's activity now generates individual rights and the development of collective bargaining has become the development of law relating to individuals.

For those with a long legal memory, you could say that all this has a distinctly feudal smell to it. The employment system seeks via a "contract" to create a person who is free but who depends on you. That used to be called vassalage. The vassal was in principle a free man, but he was required to place his intelligence and his energy at the disposal of his suzerain whenever required. Vassalage was something between a contractual and a personal tie. And a vassal could have several suzerains, even if one was clearly the principal, in exactly the same way that applies to subcontractors today.

I am not saying that we have returned to the Middle Ages. We are not going back in time, but we are seeing a return of an institutional structure that could be called a process of refeudalisation. I say this not to condemn the trend, but to try to describe what is happening. In particular, in this process we are seeing a disjunction between the functions of power and the functions of authority that we had become accustomed to see united in the public power of the nation state. There is now once again a distinction between the concepts of *potestas* and *auctoritas*. There are those who are responsible for formulating policy and those who are responsible for executing it.

In the organisation of the markets we now see appearing some strange faces in terms of our old categories. Let me give a couple of examples.

We now see new institutions having the power to make laws. At the European level, we see that the social partners can come together and lay down the law. That seems strange in a democratic system. It recalls the legislative powers of mediaeval corporations. European case law has gone so far as to say that Europe was founded on the principle of democracy and that democracy can be exercised in one of two ways: either via parliamentary democracy (as invented in the 18th century) or via collective negotiations and the social partners.

But what are these collective negotiations that now seem able to create law? They are not the same thing as the collective bargaining that developed after the war. They are something entirely new and something, I repeat, of a feudal character.

In the same way, you now have independent bodies and authorities flourishing in every corner of the Community: whole structures of agencies and regulators, or the European Central Bank, or the Commission itself (which is, perhaps, the prime example). With the Commission, what has been put on the stage is a power based on economic expertise. The Commission is supposed to be made up of people who understand the market and who derive their authority from that understanding. So the Commission exercises the functions of *auctoritas*, while the Council of Ministers exercises the functions associated with *potestas*.

The constitution of the Central Bank is the same. It was produced as an institution supposed to have expert knowledge of financial markets. Issuing from that expertise is its authority to impose regulations having the force of law.

This flourishing of agencies in the third sector seems also to be a symptom of a return to structures of a feudal kind. I do not say this as condemnation, but it is necessary to understand what is going on in order to control it. This is particularly the case when Community law opens the way by saying that there have to be limits to the extent of free competition, because it is calling social solidarity into question. It did this first in the area of social security and then in the area of collective agreements, when the case was being argued that collective negotiations were resulting in agreements that should be prohibited in terms of competition law.

I believe that there are now new spaces available, allowing for innovation in terms of social protection. Here the idea of social drawing rights seems to me to offer the possibility of a new generation of social legislation, where one could mobilise the techniques of financial co-operation which were invented in different but similar circumstances in the 19th century.

Renate Hornung-Draus

I should like to take the Social Chapter and contest Alain Supiot's argument that feudal, or pre-modern, structures are emerging at the European level. It is true that the French Revolution only took place in France, but unless you are arguing that some "feudal" elements have historically persisted in most European countries, the Social Chapter can be perceived as a necessary way of safeguarding at the European level the space for and autonomy of the social partners, which already existed in different forms in different member countries. It was a reaction to the expansion of competence at the European level, which was encroaching into fields that belonged to the social partners at national level in many countries.

An extreme case in this respect is Denmark, because Denmark has virtually no codified labour law and almost all matters of employment relations are determined by collective agreements. But it is also true, for example, for Germany, where there is a strict delimitation between what the State does and what the social partners do. In Germany, the autonomous area for the social partners and collective bargaining concerns working

conditions (working hours, wages, *etc*) and the State has never interfered in this area since the war. Against that, the exclusive competence of the legislature is to define the rules of the game, for example on codetermination. In Italy things are arranged differently, but there are still clear fields of autonomy.

These defined fields, however, did not exist at the European level. So, from the point of view of those who participated in the formulation of the Social Chapter, it was not creating something new, but protecting something that already existed at the national level, but was in danger of being undermined by Europe.

In fact, the social partners do not "make the law", because their power is confined to formulating proposals, which are submitted to the Council of Ministers, via the Commission which has to examine them to ensure that they are in conformity with the treaties. It is then the Council that creates the power to do this or that, not the social partners themselves. It is true that in the Treaty there is in theory the so-called "second way" (transposition by the institutions themselves/*transposition par les institutions ellememes)*, but it includes no legislative mechanism of the kind that exists at national level and it has never been used.

Alain Supiot argues that the social partners are taking the place of parliament. He is right, but only in a way, since this development is strictly limited to the field of working conditions, which is the only thing on which the social partners negotiate. National parliaments were not involved in this before, so why should the European parliamentary processes be involved in it now?

This area is strictly limited to the Social Chapter. It is true that the Commission took a number of initiatives based on the specific provisions of the Social Chapter. One of them was the proposal to reverse the burden of proof in cases of sex discrimination in the work place. But here the social partners declined to negotiate, not because they doubted their ability to reach an agreement, but because they said that this was a question on which parliament must legislate. I know that France is a special case, but matters like employers' obligations in respect of parental leave or of part-time workers clearly belong to the field of working conditions and, as such, fall into the autonomous field of the social partners. That is the only area of concern to them.

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